TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 28.

WESTERN FUEL COMPANY, PETITIONER,

vs.

ANTONE GARCIA, AS ADMINISTRATOR OF THE ESTATE OF MANUEL SOUZA, DECEASED.

ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

CERTIFICATE FILED JANUARY 26, 1920.

CERTIORARI AND RETURN FILED APRIL 28, 1921.

(27,444)

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No. 3195

United States

Circuit Court of Appeals

For the Ninth Circuit.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

The libelee, Western Fuel Company, a corporation, having appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the Final Decree of this Court, entered herein, you are hereby requested to prepare and certify the Apostles on Appeal, to be filed in said Appellate Court in due course. Said Apostles on Appeal are to include in their proper order and form the following papers and documents, to wit:

Original Libel.

Amended Libel.

Exceptions of Western Fuel Company to Libel.

Second Amended Libel.

Order Permitting Filing of Second Amended Libel.

Petition for Appointment of Guardian Ad Litem.

Order Appointing Guardian Ad Litem.

Exceptions of Respondent, Western Fuel Company, to Amended Libel.

Answer of Western Fuel Company to Amended Libel.

Testimony taken in Court and all exhibits introduced in evidence.

All orders of Court to which exceptions were made.

Final Decree.

Assignments of Error.

Opinion of the District Court.

Dated June 12th, 1918.

IRA S. LILLICK,
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company.

[Endorsed]: Filed Jun. 12, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

Statement of Clerk U. S. District Court.

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

TITLE OF CAUSE.

MARY SOUZA, and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem (Later as Administrator of the Estate of MANUEL SOUZA, Deceased),

Libelants,

vs.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

WESTERN FUEL COMPANY, a Corporation, and HARRY NELSON and GEORGE WEISEL,

Respondents.

PARTIES.

Libelants: Mary Souza, and Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, by Antone Garcia, their guardian ad litem, and, also, Administrator of the estate of Manuel Souza, deceased.

Respondents: Western Fuel Company, a corporation, and Harry Nelson and George Weisel. **[1-a]**

PROCTORS

for

Libelants: Henry Heidelberg, Esq., and Chris. M. Bradley, Esq., both of San Francisco, California.

Respondents: Ira S. Lillick, Esq., and Hartley F. Peart, Esq., both of San Francisco, California.

PROCEEDINGS.

1917.

August 21. Filed verified Libel for damages for loss of life, in the sum of $50,000.

Issued Citation for the appearance of respondents, which Citation was afterwards, on August 24th, 1917, filed in this office by the United States Marshal, with his return of due service attached thereto.

Filed Petition for Order appointing Antone Garcia as Guardian

Ad Litem, for the purpose of prosecuting this action, of the minors, Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza.

Filed Order Appointing Antone Garcia as Guardian *Ad Litem* for said minors.

September 24. Filed Exceptions to Libel by Western Fuel Company, a corporation.

Filed Exceptions to Libel by Harry Nelson and George Weisel, [1–b]

November 12. This cause came on regularly this day for hearing on the Exceptions of Respondents to the Original Libel, the Honorable, Frank H. Rudkin, District Judge for the Eastern District of Washington, designated to hold and holding this Court, presiding, and after argument, was ordered submitted.

16. Filed Memorandum Opinion by the Honorable Judge Rudkin, in which it was ordered that the Exceptions be overruled.

December 13. Filed Answer of Harry Nelson and George Weisel to Original Libel.

Filed Answer of Western Fuel Company, a corporation, to Original Libel.

1918.

March 15. Filed Order Allowing Libelant, Antone Garcia, Administrator, etc., to file First Amended Libel.

Filed First Amended Libel.

18. Filed Exceptions of Western Fuel Company, a corporation, to First Amended Libel.

Filed Answer of Western Fuel Company, a corporation, to First Amended Libel.

This cause came on regularly this day for trial, the Honorable M. T. Dooling, Judge, presiding. After argument of proctors for respective parties, the Court ordered that the Exceptions of Western Fuel Company, a corp., to the First Amended Libel be overruled, and that said libelant be allowed to *filed* an Answer to said First Amended Libel. The cause was then submitted to the Court for decision. [1-c]

April 30. Filed Opinion by the Honorable M. T. Dooling, Judge, in which it was ordered that libelants recover the sum of $9506 and costs, being the sum of $10,000 less $494 previously paid; and that the Libel be dismissed as to Nelson and Weisel.

May	3.	Filed Second Amended Libel.
	13.	Filed Final Decree.
	22.	Filed Notice of Appeal.
	24.	Filed Order Staying Execution ten days from date.
	28.	Filed Cost and Supersedeas Bond in the aggregate sum of $11,000.
June	12.	Filed one volume of Testimony taken in open court.
July	9.	Filed Assignment of Errors. **[1-d]**

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA, and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA, and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,

Libelants,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Libel for $50,000 Damages.

To the Honorable M. T. DOOLING, Judge of the United States District Court in and for the Northern District of California, First Division:

The libel of Mary Souza, and Eva Souza, Willie

Souza, Elma Souza, Mabel Souza, and Manuel Souza, by Antone Garcia, their guardian *ad litem,* alleges as follows:

I.

Western Fuel Company now is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, regularly transacting business in said state.

II.

The above-named libelants Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza are minors of the ages respectively as follows: Eight years, five years, four years, three years, and six months.

On the 21st day of August, the above-entitled court duly gave and made its order appointing Antone Garcia guardian *ad litem* **[2]** of said minors for the purpose of commencing, and prosecuting to final judgment an action against the above-named libelees for and on behalf of said minors to recover all damages sustained by them by reason of the death of Manuel Souza, the father of said minors, caused by reason of and through the carelessness and negligence of said libelees, and to represent said minors in all proceedings in said action; said order has never been vacated, modified, or set aside, and ever since said 21st day of August, 1917, has been and still is in full force and effect.

III.

On the 5th day of August, 1916, said Manuel Souza was in the employ of libelee, Western Fuel Company,

a corporation, being engaged in the occupation of stevedore, his duty at said time consisting of the unloading of coal for said Western Fuel Company, a corporation, from the steamer "Tancred," working at said time in the hold of said vessel.

IV.

On said 5th day of August, 1916, and while said Manuel Souza was working, as aforesaid, on board of said vessel, and while in the employ and service of said Western Fuel Company, a corporation, said Manuel Souza lost his life, in the following manner, that is to say:

Said vessel was at said time at anchor in Oakland Creek, a navigable tributary of the bay of San Francisco, in the State of California. Said vessel was at said time under charter to Western Fuel Company, a corporation, and was loaded with coal consigned to said Western Fuel Company, a corporation, and said vessel was at said time lying alongside of Howard Wharf, located in said Oakland Creek, and was discharging coal from the main hatch of said vessel into hopper #2 of said wharf in the following manner:

Said coal was first loaded from the hold of said vessel into a steel bucket, or container, and when said bucket, or container, [3] was sufficiently loaded said bucket, or container, was hoisted to the heighth of 100 feet, or thereabouts, and thereupon said bucket or container, was transferred by means of a yard-arm, or boom, a distance of 50 feet, or thereabouts, into said hopper, or bunker, all of said operations of hoisting and transferring being done by means of an electric hoist, or winch, under the

supervision and control of George Weisel, engineer or winchman, in the employ of said Western Fuel Company, a corporation. When said bucket, or container, was inside of said bunker, or hopper, it was the duty of Harry Nelson, "dumpman" in the employ of said Western Fuel Company, a corporation, to "dump" said bucket or container in such manner as to cause the coal contained therein to discharge, or spill, into said hopper or bunker.

On said August 5th, 1916, libelees herein so negligently and carelessly performed said operations of transferring and dumping said bucket, or container, as to cause a great quantity of the coal therein contained to be discharged, or spilled, into the hold of said vessel, instead of being wholly discharged or spilled into the said hopper, or bunker, by reason of which negligence and carelessness of libelees herein, said Manuel Souza was struck upon the head by said coal so discharged, or spilled, into the hold of said vessel, and fatally injured, to wit, his skull being fractured, from which injury the said Manuel Souza soon thereafter and on the said 5th day of August, 1916, died.

V.

Said death of said Manuel Souza was caused by the carelessness and negligence of libelees herein, and without any negligence or carelessness on the part of said Manuel Souza.

VI.

Said Manuel Souza on the 5th day of August, 1916, was, and for a long time prior thereto had been, the husband of Mary Souza, libelant herein, and was on

said 5th day of August, 1916, the [4] father of Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, minors of the ages of eight years, five years, four years, three years, and six months, respectively; said Mary Souza and said Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, were at said time wholly dependent upon said Manuel Souza for maintenance and support. Said Manuel Souza at said time was of the age of thirty-eight years, being strong, able-bodied, and healthy, and a sober, hardworking, industrious man, and earning wages as stevedore in the amount of $35.00 per week.

VII.

On or about the 25th day of April, 1917, the Industrial Accident Commission of the State of California, after due proceedings before said body, duly and regularly made an order in favor of Mary Souza, and against the Western Fuel Company, a corporation, ordering said Western Fuel Company, a corporation, to pay to Mary Souza a certain sum of money, basing such award of said sum of money upon the finding of said Commission that said Manuel Souza came to his death while in the employ of said Western Fuel Company, a corporation, and while working as stevedore for said Western Fuel Company, a corporation; from the award made as aforesaid, said Western Fuel Company, a corporation, took an appeal to the Supreme Court of the State of California, which said Supreme Court of the State of California, on or about the 6th day of August, 1917, made an order reversing, annulling, and setting aside said

award so made by said Industrial Accident Commission to the said Mary Souza and as against the said Western Fuel Company, a corporation, on the grounds that said Industrial Accident Commission was without jurisdiction to make the same.

VIII.

By reason of the death of said Manuel Souza, so caused by the negligence and carelessness of libelees herein, libelants have suffered damages in the sum of Fifty Thousand Dollars ($50,000), no part of which has been paid. **[5]**

IX.

All and singular of the premises herein are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelants herein pray that process may issue in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction against said libelees, and that they may be cited and admonished to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the aforesaid damages with costs, and that libelants herein have such other and further relief as in law and justice they may be entitled to receive.

HENRY HEIDELBERG,
CHRIS. M. BRADLEY,
Proctors for Libelants. **[6]**

State of California,
City and County of San Francisco,—ss.

Antone Garcia, being duly sworn, deposes and

says: That he is the guardian *ad litem* of the minors in the above-entitled action, that as such guardian *ad litem* he is a libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ANTONE GARCIA.

Subscribed and sworn to before me this 21st day of August, 1917.

[Seal] HARRY H. SULLIVAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 21, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,
Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

(Petition for Order Appointing Guardian Ad Litem.)

Tn the Honorable M. T. DOOLING, Judge of the United States District Court in and for the Northern District of California, First Division:

The petition of Antone Garcia respectfully shows:

That Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, are minors of the ages of eight years, five years, four years, three years, and six months; that the father of said minors is dead; that your petitioner is the godfather of said minors; that said minors have no guardian of either their persons or their estate appointed by will or otherwise.

That on the 5th day of August, 1916, at the city of Oakland, county of Alameda, State of California, Manuel Souza, father of said minors, sustained injuries, as a result of which he thereafter and on the 5th day of August, 1916, died, while engaged in the occupation of stevedore in the employ of libelee Western Fuel Co., a corporation, on the vessel "Tancred," owned by said Western Fuel Co., a corporation, while at anchor in [8] Oakland Creek, a navigable tributary of the bay of San Francisco, State of California, by and through the negligence of said libelees; that the wife and children of said Manuel Souza, deceased, desire to commence an action against said Western Fuel Co., a corporation, to recover all damages sustained by them by reason of the death of said Manuel Souza.

That it is necessary that a guardian *ad litem* be

appointed for said minors to commence and prosecute to final judgment on their behalf said contemplated action against said corporation to recover all damages sustained by them by reason of the death of their said father.

That annexed hereto is the written consent and request of the mother of said minors that petitioner be appointed as guardian *ad litem* for said purpose.

WHEREFORE your petitioner prays that an order be forthwith made appointing him guardian *ad litem* of said minors for the purpose aforesaid.

ANTONE GARCIA,
Petitioner.

HENRY HEIDELBERG and
CHRIS. M. BRADLEY,
Proctors for Petitioner. [9]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,
Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Consent of Mary Souza to Appointment of Guardian Ad Litem.

To the Honorable District Court of the United States in and for the Northern District of California, First Division:

I, the undersigned, Mary Souza, mother of Eva Souza, Willie Souza, Elma Souza. Mabel Souza and Manuel Souza, minors of the ages of eight (8) years, five (5) years, four (4) years, three (3) years, and six (6) months, respectively, hereby consent and request that Antone Garcia be appointed guardian *ad litem* of said minors for the purpose of commencing on their behalf an action against the Western Fuel Co., a corporation, Harry Nelson, and George Weisel, to recover all damages sustained by them by reason of the death of their father Manuel Souza, which occurred through the negligence of said corporation and said Harry Nelson and said George Weisel, and for the purpose of prosecuting said action to final judgment.

Dated August ——, 1917.

Her
MARY X SOUZA.
Mark.

Witness to mark:
ANTONE GARCIA.

[Endorsed]: Filed Aug. 21, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,

Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Order Appointing Guardian Ad Litem.

Antone Garcia, having heretofore filed herein his petition praying for an order appointing him guardian *ad litem* of Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, minors, for the purpose of commencing and prosecuting to final judgment an action against Western Fuel Company, a corporation, Harry Nelson and George Weisel, to recover all damages sustained by said minors by reason of the death of their father, Manuel Souza, resulting from injuries sustained while engaged in the occupation of stevedore in the employ of libelee Western Fuel Company, a corporation, and while at work on the vessel "Tancred," chartered by said Western Fuel Company, a corporation, and while said vessel was at anchor in Oakland Creek, a navi-

gable tributary of the bay of San Francisco, in the State of California, on the 5th day of August, 1916, by and through the alleged negligence of said libelees.

And it further appearing to the Court that all of the allegations in the libel filed against Western Fuel Co., a corporation, Harry Nelson, and George Weisel, libelees, are, and each of them is, true; that the said Eva Souza, Willie Souza, Elma Souza, [11] Mabel Souza and Manuel Souza are minors of the ages of eight years, five years, four years, three years and six months, respectively, and that accompanying said petition of Antone Garcia is a nomination and petition in writing of Mary Souza, mother of said minors, requesting this Court to appoint said Antone Garcia as their guardian *ad litem* for said purpose.

And it further appearing to the Court that on the 5th day of August, 1916, said minors, Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, sustained injury through and by reason of the death of their father through the alleged negligence of said libelees Western Fuel Co., a corporation, Harry Nelson and George Weisel, and that in order to recover the damages sustained by them by reason of said death it will be necessary, on behalf of said minors, to commence and prosecute to final judgment an action against said Western Fuel Co., a corporation, Harry Nelson and George Weisel; and it appearing to the Court that it is necessary that a guardian *ad litem* be appointed for said minors, Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, to commence and prosecute to final

judgment said action and to represent them therein, and that Antone Garcia is a fit and proper person to be appointed such guardian *ad litem.*

NOW, THEREFORE, IT IS HEREBY ORDERED that said Antone Garcia be and he is hereby appointed guardian *ad litem* of said minors for the purpose of commencing and prosecuting to final judgment an action against said Western Fuel Co., a corporation, Harry Nelson, and George Weisel, for the purpose of recovering from them, and each of them, all damages sustained by said minors by reason of the death of their father on the 5th day of August, 1916, through the alleged negligence of said libelees.

Dated August 21, 1917.

WM. H. HUNT,

Judge of the District Court of the United States, Northern District of California, First Division. [12]

[Endorsed]: Filed Aug. 21, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

MARY SOUZA and EVA SOUZA, WILLIE SOUZA, ELMA SOUZA, MABEL SOUZA and MANUEL SOUZA, by ANTONE GARCIA, Their Guardian Ad Litem,

Libelants,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Exceptions to Libel (Western Fuel Company).

To the Honorable MAURICE T. DOOLING, Judge of Said Court:

The exceptions of libelee, Western Fuel Company, a corporation, to the libel filed in the above-named cause, allege:

I.

That said libel is insufficient and does not state facts sufficient to constitute a cause of libel against this libelee.

II.

That said libel is insufficient and does not state a cause of libel, in that it does not appear therefrom, nor can it be ascertained therefrom, under what statute libelants claim a cause of action.

III.

That said libel is uncertain, ambiguous and unintelligible for the same reasons that it is herein alleged to be insufficient.

IV.

That the pretended cause of action set forth in said libel is barred by the provisions of section 340 of the Code of Civil Procedure of the State of California. [14]

WHEREFORE, said libelee prays that the libel may be dismissed, with its costs herein.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee, Western Fuel Company, a Corporation.

Due service and receipt of a copy of the within exceptions is hereby admitted this 22d day of Sept., 1917.

HENRY HEIDELBERG,
CHRIS. M. BRADLEY,
Proctors for Libelants.

[Endorsed]: Filed Sep. 24, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 12th day of November, in the year of our Lord one thousand nine hun-

dred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, Designated to Hold and Holding this Court.

No. 16,248.

MARY SOUZA et al.

vs.

WESTERN FUEL CO. et al.

Minutes of Court—November 12, 1917—Hearing on Exception to Original Libel.

(MINUTES OF HEARING ON EXCEPTIONS TO ORIGINAL LIBEL.)

This cause came on regularly this day for hearing of the exceptions to the libel herein, and after being argued by proctors for respective parties, the Court ordered said matter submitted. **[16]**

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,248.

MARY SOUZA et al.,

Libelants,

vs.

WESTERN FUEL CO., a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Opinion and Order Overruling Exceptions to Original Libel.)

HENRY HEIDELBERG and CHRIS. M. BRADLEY, for Libelants.

HARTLEY F. PEART and IRA S. LILLICK, for Libelees.

MEMORANDUM BY RUDKIN, DISTRICT JUDGE.

This is a libel against the Western Fuel Company and two of its servants or employees to recover damages for death by wrongful act.

The libel charges that the deceased, Manuel Souza, together with the two individual libelees, were engaged [17] in unloading coal from the steamship "Tancred" at the Howard Wharf in Oakland Creek by means of an electric hoist or winch, and that,

> "On said August 5th, 1916, libelees herein so negligently and carelessly performed said operation of transferring and dumping said bucket, or container, as to cause a great quantity of the coal therein contained to be discharged, or spilled, into the hold of said vessel, instead of being wholly discharged or spilled into the said hopper, or bunker, by reason of which negligence and carelessness of libelees herein, said Manuel Souza was struck upon the head by said coal so discharged, or spilled, into the hold of said vessel, and fatally injured, to wit, his skull being fractured, from which injury the said Manuel Souza soon thereafter and on the said 5th day of August, 1916, died."

The libelants are the surviving widow and minor children of the deceased.

The libelees have excepted to the libel on the ground that it does not state facts sufficient to constitute a cause of libel against them, and on the further grounds that it does not appear under what statute the libelants claim and that the cause of libel is barred by the one year Statute of Limitations.

Of course no right of action for death by wrongful act existed either at common law or in admiralty, and if such right of action exists in this case it must be by virtue of some statute of the state. I do not understand [18] however, that it is necessary to refer to or plead the statute relied on.

Section 377 of the Code of Civil Procedure contains the usual provision that when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. This section was later amended by section 1970 of the Civil Code, which changes in a measure the common-law rule of fellow-servants and possibly the common-law doctrine of assumption of risk.

Next in order of time comes the so-called Roseberry Act of 1911, which among other things, establishes the doctrine of comparative negligence, abrogates the defense of contributory negligence where the violation of any statute enacted for the safety of employees contributed to the injury, and also the doctrine of assumption of risk and the fellow-servant doctrine. This Act was followed in 1913 by the

Workmen's Compensation Act. Section 14 of that Act provides:

> "The term 'employee' as used in sections twelve to thirty-five, inclusive, of this act shall be construed to mean: every person in the service of an employer as defined by section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, but excluding any person whose employment is both casual and not in the usual course of the trade, business, [19] profession or occupation of his employer, and also excluding any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising or in household domestic service."

Section 90 repeals all acts and parts of acts in conflict therewith.

The libelees earnestly insist that this statute takes away the right of action for death by wrongful act where the relation of master and servant exists, except as to the employees especially excluded by section 14, and that inasmuch as the deceased did not belong to any of the excluded classes, no right of action exists in favor of his widow and children.

The question thus presented is not free from difficulty. Inasmuch, however, as the Supreme Court of the state has held that the present libelants have no claim under the Workmen's Compensation Act, it would seem to follow that the employment of the deceased was not covered by that act and therefore that

prior laws are not inconsistent or in conflict with the later act.

The objection that the action is prosecuted by the widow and children instead of by the personal representative is in my opinion not well taken.

The claim that the deceased met his death through the negligence of fellow-servants is answered by the statutes of this state, and I am inclined to the opinion that the prosecution of the claim in the state courts under the [20] Workmen's Compensation Act is a sufficient excuse for the slight delay in failing to file the present libel within the year prescribed by law.

In any event, all question of law and fact involved in the case should be settled and determined in a single trial with but one appeal, and to that end the exceptions are overruled.

[Endorsed]: Filed Nov. 16, 1917. Walter B. Maling, Clerk. [21]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Order (Allowing the Filing of First Amended Libel).

Good cause appearing therefor,

IT IS HEREBY ORDERED that libelant, Antone Garcia, may file the within-amended libel.

Dated March 15, 1918.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk [22]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

(First Amended) Libel for $50,000 Damages.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California, First Division:

Now comes the above-named libelant, Antone

Garcia, and by leave of Court first had and obtained, files this his first amended libel:

I.

Western Fuel Company now is and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and regularly transacting business in said State.

II.

Manuel Souza died intestate in the city of Oakland, county of Alameda, State of California, on the 5th day of August, 1916, being at the time of his death a resident of [23] the County of Alameda, State of California, and leaving estate therein.

Thereafter and on the 15th day of March, 1918, the Superior Court of the State of California, in and for the county of Alameda, by its order duly given, made and entered, appointed said Antone Garcia, libelant herein, administrator of the estate of said Manuel Souza, deceased, and directed that letters of administration upon said estate be issued to him upon his qualifying as such administrator.

Thereafter and on the 15th day of March, 1918, said Antone Garcia duly qualified as such administrator, letters of administration upon the estate of said deceased were thereupon duly issued to said Antone Garcia, and he ever since has been and now is the duly appointed, qualified and acting administrator of the estate of said Manuel Souza, deceased.

III.

On the 5th day of August, 1916, said Manuel Souza was in the employ of libelee, Western Fuel Company,

a corporation, being engaged in the occupation of stevedore, his duty at said time consisting of the unloading of coal for said Western Fuel Company, a corporation, from the steamer "Tancred," and was working at said time in the hold of said vessel.

IV.

On said 5th day of August, 1916, and while said Manuel Souza was working as aforesaid on board of said vessel, and while in the employ and service of said Western Fuel Company, a corporation, said Manuel Souza lost his life in the following manner:

Said vessel was at said time at anchor in Oakland Creek, a navigable tributary of the bay of San Francisco, in the State of California. Said vessel was at said time under the charter of the Western Fuel Company, a corporation, and was loaded with coal consigned to said Western Fuel Company, a corporation, and [24] said vessel was at said time lying alongside of Howard Wharf, located in said Oakland Creek, and was discharging coal from the main hatch of said vessel into hopper No. 2 of said wharf in the following manner:

Said coal was first loaded from the hold of said vessel into a steel bucket or container, and when said bucket or container was sufficiently loaded with coal said bucket or container was hoisted to a height of about 100 feet, or thereabouts, and thereupon said bucket or container was transferred by means of a yard-arm boom a distance of fifty (50) feet, or thereabouts, into said hopper or bunker. All of said operations of hoisting and transferring being done by means of an electric hoist or winch under the

supervision and control of George Weisel, engineer or "winchman" in the employ of said Western Fuel Company, a corporation. When said bucket or container was inside of said bunker or hopper it was the duty of Harry Nelson, "dumpman," in the employ of said Western Fuel Company, a corporation, to dump said bucket or container in such manner as to cause the coal contained therein to discharge or spill into said hopper or bunker.

On said August 5, 1916, libelees herein negligently and carelessly performed said operation of transferring and dumping said bucket or contained as to cause a great quantity of the coal therein contained to be discharged or spilled into the hold of said vessel, instead of being wholy discharged or spilled into said hopper or bunker, by reason of which negligence and carelessness of libelees herein, said Manuel Souza was struck upon the head by said coal so discharged or spilled into the hold of said vessel and fatally injured, to wit, his skull being fractured, from which injury the said Manuel Souza soon thereafter and on the 5th day of August, 1916, died. [25]

V.

Said death of said Manuel Souza was caused by the carelessness and negligence of libelees herein, and without any negligence or carelessness on the part of said Manuel Souza.

VI.

Said Manuel Souza on the 5th day of August, 1916, was and for a long time prior thereto had been the husband of Mary Souza, and was on the 5th day of August, 1916, the father of Eva Souza, Willie Souza,

Elma Souza, Mabel Souza and Manuel Souza, Jr., minors of the age of eight (8) years, five (5) years, four (4) years, three (3) years, and six (6) months respectively. Said Eva, Willie, Elma, Mabel and Manuel Souza were at said time wholly dependent upon said Manuel Souza for maintenance and support. Said Manuel Souza at said time was of the age of thirty-eight (38) years, being strong, able-bodied and healthy, and a sober, hard working, industrious man, and earning wages as stevedore in the amount of thirty-five dollars ($35) per week.

VII.

On or about the 25th day of April, 1917, the Industrial Accident Commission of the State of California, after due proceedings before said body, duly and regularly made an order in favor of Mary Souza, and against the Western Fuel Company, a corporation, ordering said Western Fuel Company, a corporation to pay to Mary Souza a certain sum of money, basing such award of said sum of money upon the finding of said Commission that said Manuel Souza came to his death while in the employ of said Western Fuel Company, a corporation, and while working as stevedore for said Western Fuel Company, a corporation; from the award made as aforesaid, said Western Fuel Company, a corporation, took an appeal to the Supreme Court of the State of California, which said Supreme Court [26] of the State of California, on or about the 6th day of August, 1917, made an order reversing, annulling, and setting aside said award so made as against the said Western Fuel Company, a corporation, on the grounds that said

Industrial Accident Commission was without jurisdiction to make the same.

VIII.

By reason of the death of said Manuel Souza, so caused by the negligence and carelessness of libelees herein, the heirs of said Manuel Souza as above set out have suffered damages in the sum of Fifty Thousand Dollars ($50,000), no part of which has been paid.

IX.

All and singular of the premises herein are true and within the admiralty jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, libelant herein prays that process may issue in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction against said libelees, and that they may be cited and admonished to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the aforesaid damages with costs, and that libelant herein have such other and further relief as in law and justice he may be entitled to receive.

CHRIS. M. BRADLEY and
HENRY HEIDELBERG,
Proctors for Libelant. [27]

State of California,
City and County of San Francisco,—ss.

Antone Garcia, being duly sworn, deposes and says:

That he is the administrator of the Estate of Man-

uel Souza, deceased; that as such administrator he is libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ANTONE GARCIA.

Subscribed and sworn to before me this 15th day of March, 1918.

[Seal] HARRY F. SULLIVAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Exceptions to First Amended Libel (Western Fuel Company).

To the Honorable MAURICE T. DOOLING, Judge of said Court:

The exceptions of libelee, Western Fuel Company, a corporation, to the first amended libel filed in the above-named cause, allege:

I.

That said first amended libel is insufficient and does not state facts sufficient to constitute a cause of libel against this libelee.

II.

That said first amended libel is insufficient and does not state a cause of libel, in that it does not appear therefrom, nor can it be ascertained therefrom, under what statute libelant claims a cause of action.

III.

That said first amended libel is insufficient and does not state a cause of libel in that it does not appear therefrom nor can it be ascertained therefrom how or wherein this libelee or the other libelees herein or any of them was or were negligent [29] in any manner whatsoever as regards the said Manuel Souza.

IV.

That said first amended libel is insufficient and does not state a cause of libel in that it does not appear therefrom nor can it be ascertained therefrom in what the negligence of this libelee or the other libelee herein or either or any of them consisted.

V.

That said first amended libel is uncertain, ambiguous and unintelligible for the same reasons that it is herein alleged to be insufficient.

VI.

That the pretended cause of action set forth in said first amended libel is barred by the provisions of Section 340, subdivision 3 of the Code of Civil Procedure of the State of California.

VII.

That the pretended cause of action set forth in said first amended libel is barred by the laches of libelant.

WHEREFORE, said libelee prays that the said first amended libel may be dismissed, with its costs herein.

IRA S. LILLICK and
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company, a Corporation.

[Endorsed]: Service acknowledged this 18th day of March, 1918. Christopher M. Bradley and Henry Heidelberg, for Libelant. Filed March 18, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [30]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Answer to Western Fuel Company, a Corporation, to First Amended Libel.

To the Hon. M. T. DOOLING, Judge of the United States District Court, for the Northern District of California, First Division:

The answer of the Western Fuel Company, a corporation, to the first amended libel of Antone Garcia, as administrator of the estate of Manuel Souza, deceased, libelant, admits, denies and alleges as follows:

I.

Said libelee admits the allegations of Article One of said first amended libel.

II.

Said libelee is ignorant as to the allegations of Article Two of said first amended libel, other than the death of Manuel Souza August 5, 1916, and for that reason demands that strict proof be made of all the same with said exception, and each and every part thereof.

III.

Answering the allegations of Article Three of said first [31] amended libel said libelee admits that on or about the 5th day of August, 1916, said Manuel Souza was in the employ of said libelee and engaged in the occupation of stevedore and that his duty during the regular working hours at said time consisted of assisting in unloading coal for said libelee from the steamer "Tancred" and that during his working hours said Manuel Souza was working in the hold of said vessel; but in this behalf said libelee alleges that at said time and place the regular working hours of said Manuel Souza were from 7:00 A. M. until 11:00 A. M. and from 12 M. to 5:00 P. M., and in this behalf this libelee denies that said Manuel Souza was at work in the performance of his duty at the time he was injured as alleged in said first amended libel.

IV.

Answering unto the allegations of Article Four of said first amended libel said libelee admits that on or about the 5th day of August, 1916, the said Manuel Souza lost his life on board of said vessel; that said vessel was at said time at anchor at Oakland Creek, a navigable tributary in the Bay of San Francisco, in the State of California. Said libelee alleges that said vessel at said time was, and still is, owned by Wilhelm Wilhelmsen. Said libelee further alleges that said vessel was at said time under charter to the Western Fuel Company, and that said corporation was the owner of the coal contained in said vessel at the time that said vessel was lying alongside

of Howard Wharf, located on said Oakland Creek.

V.

Further answering said Article Four said libelee denies that said Manuel Souza lost his life while he was working as aforesaid or otherwise, and/or while in the employ and/or service of this libelee; and this libelee denies that this libelee or either or any of the libelees herein on August 5th, 1916, or at any other [32] time in discharging the cargo of said steamer as alleged in said first amended libel or otherwise negligently and/or carelessly performed the operation of transferring and/or dumping said or any bucket, and/or container, so as to cause a great or any quantity of the coal therein contained to be discharged and/or spilled into the hold of said steamer; and denies that by reason of said or any negligence and/or carelessness of the libelees herein or any of them said Manuel Souza was struck upon the head or otherwise by said or any coal or at all, discharged or spilled into the hold of said vessel and/or fatally injured, or that his skull was thereby fractured; and this libelee denies that it was negligent or careless or that any of the libelees herein were negligent or careless in any particular in the operation of transferring or dumping any buckets containing coal out of the hold of said vessel or that said Manuel Souza was struck or injured or killed by reason of any negligence or carelessness of this libelee or any of the libelees herein, and in this behalf said libelee alleges that said coal was being discharged in the customary and usual manner, and that at, and before, the time said coal was being discharged into the hop-

pers, and/or bunkers, said Manuel Souza well knew and was familiar with the condition of the holds of said steamer and the conditions pertaining to the discharge of said coal into said hoppers, and/or bunkers, and that if the neglect of anyone, other than Manuel Souza contributed to the accident which resulted in the death of said Manuel Souza, it was the neglect of a fellow-servant of said Manuel Souza.

VI.

Further answering Article Four of said first amended libel said libelee alleges that at the time of the accident complained of, to wit: at the hour of 11:50 o'clock A. M. of said 5th day of [33] August, 1916, and during the hour allowed said Manuel Souza for his lunch, said Manuel Souza was in the hold of the said vessel by reason of his own voluntary act, and not for the purpose of attending to any duty arising out of the course of his employment, and said Manuel Souza was so injured, at a time prior to the time when under the terms of his employment he was to return to work, and in violation of instructions which had theretofore been given to said Manuel Souza not to stand around the hold of said vessel, nor to go into or upon said vessel until time to resume his work, but notwithstanding these instructions, and in violation thereof, said Manuel Souza, at the time said injury occurred, was standing about under the buckets that were being raised from the hold of the said steamer and at said time and place was neither working nor attending to any duty in connection with his said employment.

VII.

Answering unto Article Five of said first amended libel, said libelee denies that the death of said Manuel Sousa was caused by the negligence, and/or carelessness, of the said libelee; but in this behalf alleges that the death of said Manuel Souza from injuries received upon the occasion described in said first amended libel, was directly caused by the carelessness and negligence of said Manuel Souza and without any carelessness or negligence whatever on the part of said libelee, its agents, servants, employees, or either, or any, thereof; and further alleges that the condition of the holds of said vessel, and the movement of buckets described in said first amended libel, and the general conditions pertaining to the discharging of coal from said holds of said vessel to the said hoppers, and/or bunkers, upon the wharf, were well known to said Manuel Souza, and that the conditions under which said vessel was being discharged were neither insecure, unsafe or dangerous in any particular. [34]

Said libelee further alleges that if the negligence of anyone other than Manuel Souza contributed to the accident which resulted in the death of said Manuel Souza in said first amended libel complained of, it was the negligence of a fellow servant of said Manuel Souza.

VIII.

Said libelee is ignorant as to the allegations of Article Six of said first amended libel, and for that reason demands that strict proof be made of the same, and each and every part thereof, but admits

that the said Manuel Souza was earning wages as a stevedore in the sum of not more than Seventeen and 35/100 ($17.35) Dollars per week.

IX.

Said libelee denies that by reason of the death of said Manuel Souza that his heirs have suffered damage in the sum of Fifty Thousand ($50,000.) Dollars, or any other sum whatsoever; and denies that this libelee or any of its agents or servants were negligent or careless in any manner whatsoever, or that this libelee or any of its agents or servants caused the death of said Manuel Souza.

X.

And as a further and separate defense to the alleged cause of first amended libel, libelee further alleges:

1.

That the death of said Manuel Souza was caused by the negligence and carelessness of the said deceased in that, in violation of the instructions of said libelee and of the terms of his employment, he voluntarily went upon said vessel and down into the hold of said vessel prior to the time said deceased was to resume his employment; and that at said time, to wit, at 11:50 o'clock [35] A. M., or thereabouts, of said 5th day of August, 1916, said Manuel Souza voluntarily and without duty or obligation upon his part to said libelee, and negligently and carelessly stood in the hold of said steamer below the ascending buckets of coal in such a position that coal spilling over the edge of said buckets during their ascent, or from said hoppers might strike him, and that

said deceased was so struck by a lump of coal which spilled or fell from the top of one of said ascending buckets of coal, or from said hopper, so causing the injuries to said Manuel Souza from which his death ensued.

2.

That said decedent had worked and been employed as a stevedore in unloading coal from ships with similar apparatus for many years and that he then and there well knew that coal frequently fell from ascending buckets or spilled from the hopper into which the buckets were dumped, and that in the use of such machinery and apparatus in good and sound and workable condition some coal frequently dropped as aforesaid, into the hold of a vessel beneath; that said deceased was guilty of gross negligence in so as aforesaid voluntarily placing himself in a position to be injured from a plain, patent, known and obvious danger.

XI.

And for a further and separate defense to the alleged cause of libel, said libelee further alleges:

1.

That said death resulting from the alleged injuries and damage to said Manuel Souza was proximately caused by, and proximately resulted from, an ordinary risk of the work in which said Manuel Souza was then engaged, and that said risk was obvious, [36] apparent, patent and known to and fully comprehended, understood and appreciated by said Manuel Souza at all of the times therein mentioned.

2.

That said death resulting from said alleged injuries and said damage to said Manuel Souza was proximately caused by, and proximately resulted from, an ordinary risk of the employment of said Manuel Souza.

XII.

And for a further and separate defense to the alleged cause of libel said libelee further alleges:

1.

That the said steel bucket or container, and the said yard-arm boom and the said hopper or bunker and the said electric hoist all in said first amended libel described and each and every part and portion thereof, were at the time of the said accident resulting in the death of said Manuel Souza as in said first amended libel alleged, of the most modern and improved type of machinery and equipment for the purposes for which used and were in safe and sound condition and in good working order.

XIII.

And for a further and separate defense to the alleged cause of libel, said libelee further alleges:

1.

That the pretended cause of action set forth in said first amended libel is barred by the provisions of Section 340, subdivision 3 of the Code of Civil Procedure of the State of California.

2.

That the pretended cause of action set forth in said first amended libel is barred by the laches of the libelant. **[37]**

WHEREFORE, said libelee prays that libelants take nothing by their pretended cause of libel, and that said first amended libel be dismissed as to the libelee, Western Fuel Company, and that it have judgment against said libelant for its costs incurred herein.

WESTERN FUEL COMPANY,
By C. P. HEATON,
President.

IRA S. LILLICK and
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company.

State of California,
City and County of San Francisco,—ss.

C. P. Heaton, being first duly sworn, deposes and says: That he is an officer of the libelee, Western Fuel Company, a corporation, to wit, the president thereof, and as such officer is authorized to make this affidavit on its behalf; that he has read the foregoing answer and knows its contents, and that it is true as he verily believes.

C. P. HEATON.

Subscribed and sworn to before me this 18 day of March, 1918.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. Dist. Court, Northern Dist. of California.

Service of copy of the within Answer admitted this 18th day of March, 1918.

CHRISTOPHER M. BRADLEY and
HENRY HEIDELBERG,

For Libelants.

[Endorsed]: Filed March 18, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [38]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 18th day of March, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,248.

MARY SOUZA et al.

vs.

WESTERN FUEL CO. et al.

Minutes of Court—March 18, 1918—Trial.

(MINUTES OF TRIAL.)

This cause came on regularly this day for hearing of the issues joined herein. Henry Heidelberg, Esq., and Chris. M. Bradley, Esq., were present as proctors for and on behalf of libelants. Ira S. Lillick, Esq., and Hartley F. Peart, Esq., were present for and on behalf of libelees. Mr. Peart filed excep-

tions to first amended libel, which the Court ordered overruled. On motion of Mr. Peart, the Court ordered that libelees be and they are hereby allowed to file answer to first amended libel. Mr. Heidelberg made opening statement, and called Antone Garcia, Joe Costa, Manuel Repose, August Silva, Joe Mendonsa, Anton Lima, Frank Duart, J. Swartz, Harry Nelson and Mary Souza, each of whom was duly sworn and examined on behalf of libelants and introduced in evidence certain exhibits which were filed and marked Libelants' Exhibit "A" (Letter of Administration Copy) and Libelants' Exhibit "B" (Photo). Mr. Heidelberg also introduced in evidence a certified copy of marriage certificate of Manuel Souza and Mary Rocha, which was filed and marked Libelants' Exhibit "C." Mr. Peart introduced in [39] evidence two photos, which were filed and marked respectively Libelees' Exhibits 1 and 2, and called George Hayes and John Benson, who were each duly sworn and examined on behalf of libelees. Mr. Peart recalled Harry Nelson, who was further examined. Mr. Heidelberg recalled Manuel Repose for further examination. The proctors for the respective parties then argued the cause, and stipulated that the ship on which Manuel Souza met his death was a Norwegian vessel chartered to Western Fuel Co., under a five (5) year charter. Further ordered that libelants have five (5) days within which to file briefs and libelees have five (5) days within which to file answering briefs. On motion of Mr. Heidelberg, the Court ordered that libelants be, and they are hereby allowed to withdraw

Libelants' Exhibit "B" (Photo) from the files of this cause. **[40]**

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Before Hon. M. T. DOOLING, Judge.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HAROLD NELSON and GEORGE WEISEL,

Respondents.

(Testimony Taken in Open Court.)

Monday, March 18, 1918.

COUNSEL APPEARING:

For the Libelant: CHRIS. M. BRADLEY, Esq., and HENRY HEIDELBERG, Esq.

For the Respondents: IRA S. LILLICK, Esq., and HARTLEY F. PEART, Esq.

Testimony of Antone Garcia, for Libelant.

ANTONE GARCIA, called for the libelant, sworn.

Mr. BRADLEY.—Q. Your name is Antone Garcia? A. Antone Garcia.

Q. Where do you live?

A. I live at 176 Second street.

Q. What is your occupation?

(Testimony of Antone Garcia.)

A. My occupation is assistant agent for the Southern Pacific Company, foot of Boardway.

Q. How long have you been so occupied?

A. I have been occupied at that position for the last ten years; working for the Southern Pacific Company for the last eighteen years.

Q. Prior to that time what was your occupation?

[41]

A. I have been stevedore, the same as a freight-handler, at Long Wharf; off and on I used to work at Oakland Pier.

Q. Are you the same Antone Garcia who was, on the 15th of March, 1918, appointed by the Superior Court of the county of Alameda, State of California, administrator of the estate of Manuel Souza, deceased? A. That is me.

Mr. BRADLEY.—You have no objection to offering a copy of the letters?

Mr. PEART.—No.

Mr. BRADLEY.—We offer as Libelant's Exhibit "A" a copy of the letters of administration.

Q. Did you know Manuel Souza in his lifetime.

A. Yes.

Q. How long had you known him prior to his decease? A. About 30 or 32 years.

Q. Where did you know him?

A. I know him from Honolulu.

Q. And in Oakland? A. Yes.

Q. Do you know his family? A. Yes.

Q. Of whom does the family consist?

A. Well, what do you mean?

(Testimony of Antone Garcia.)

Q. I will withdraw that question. Was Manuel Souza a married man? A. Yes.

Mr. PEART.—Don't get to leading him too much.

Mr. BRADLEY.—I think the Court can control that. Do you know his wife? A. Yes.

Q. His wife at the present time, what is her name?

A. Mary Souza.

Q. How long have you known her?

A. I have known her for the last fourteen years.

Q. Did you know the parties before they were married? A. No, I did not—yes, I did.

Q. Do you know the children of Manuel Souza?

A. Yes.

Q. How many are there living?

A. There are five of them.

Q. How many of them were alive at the time Manuel Souza lost his [42] life?

A. There were four of them.

Q. How long after he lost his life, if you know, was the fifth child born?

A. Four or five months after.

Q. Where does this family live?

A. They live at—I forget just the number of the house, but they live at the corner of Second and Jackson, in Oakland.

Q. What was the occupation of Manuel Souza?

A. A coal shoveler or stevedore.

Q. Do you know what his family relations were with reference to being a happy, contented family or not? A. Yes.

Q. Are you familiar with the provision he made

(Testimony of Antone Garcia.)

for the support and maintenance of his family and his children? A. Yes.

Q. What were his habits and disposition toward his family in those respects?

A. He treated his family awfully nice, provided them with everything that they needed; he was a man that would give his wife his wages.

Q. What were the habits of Manuel Souza with reference to being an industrious workman, or not?

A. He was a hard-working man.

Q. What with reference to his personal habits, were they good or bad?

A. He was a good man all over, a man that you never heard him swear or anything like that; just go to work in the morning, looking for day's work; if he could not get work shoveling, he would go to work on lumber; if he could not get any lumber, he would load cement; a regular rustler, what I would call a rustler.

Q. Did he do any other kind of work than shovel coal, occupy any position superior or inferior to that at any time, in your knowledge?

A. As I said, if he couldn't get any job shoveling, he would go to work loading cement and handling lumber, such things as that.

Q. Within your knowledge, did he ever act as hatch-tender? [43]

A. Sure; once in a while.

Q. Is that a higher or lower grade of employment than stevedoring or shoveling coal?

A. That is a higher grade of employment; they

(Testimony of Antone Garcia.)

are responsible for the crew down in the hatches.

Q. Can you state whether or not he was an efficient man at that kind of work.

A. He was an efficient man at that kind of work; he was a nice man all over.

Q. From your experience and observation, of your own knowledge, do you know what wages are paid hatch-tenders in that vicinity for that kind of work?

A. At the time that I used to be stevedoring myself they used to pay the hatch-tenders $6 a day.

Q. You do not presume to state that you know what the wages were about the time he lost his life?

A. No, I can't just exactly say the wages, but at the time I was stevedoring, and the time he was coal-shoveler, they used to get a dollar more than stevedores—the hatch-tenders was paid a dollar more, on account of being responsible for the men that are downstairs.

Q. Do you know what the education of Manuel Souza was?

A. I know Souza was pretty well educated.

Q. Where did he get his schooling if you know?

A. He got his education at St. Louis College, in Honolulu.

Q. Do you know what the rank of that college is, and grade?

A. It is a nice school, that I know of; it is a high school; it is a college at Honolulu, and he went through there—that is, he went to school; of course, I don't know, but it seems to me high-tone people go there to get their education, in St. Louis College.

(Testimony of Antone Garcia.)

Q. Is there a high school in Honolulu?

A. St. Louis College is a commercial school.

Q. Mr. Garcia, are you familiar with the proceedings that were instituted before the Industrial Accident Commission of the State [44] of California in behalf of Mrs. Souza and her minor children to enforce a claim under the workmen's compensation law?

Mr. LILLICK.—I object to that as immaterial, irrelevant and incompetent; I presume, under the theory of the libelant, they must show reasons for failing to file this case within the one-year period; the fact that such a proceeding had been instituted would be of some materiality, but otherwise we have an objection to it as being wholly immaterial, irrelevant and incompetent.

Mr. BRADLEY.—Counsel has anticipated the purpose of this line of questions.

Mr. PEART.—That is admitted in the answer filed to the first amended libel, that these proceedings were begun.

Mr. BRADLEY.—Is it admitted in the second?

Mr. PEART.—Yes.

Mr. BRADLEY.—And the proceedings were constantly carried through with diligence for the period of something like a year, and the decision of the Supreme Court of the State was rendered one day after the expiration of one year after the date of the accident, the accident being on the 5th of August, 1916, and the decision of the Court finally disposing of the matter being on August 6, 1917.

(Testimony of Antone Garcia.)

Mr. PEART.—Yes, within a day or two; I don't remember as to it exactly. Mr. Bradley knows better than I, but the record shows very closely. That is all.

Cross-examination.

Mr. PEART.—Q. Mr. Garcia, were you working with Mr. Souza at the time that he was killed?

A. No.

Q. How long since you had been working as a stevedore yourself? A. With Manuel Souza?

Q. No. A. I will tell you, about 13 years.

Q. About 13 years?

A. Thirteen years before this. [45]

Q. You have been at some other occupation for the last 13 years, then? A. Yes.

Q. Have you any recollection of Mr. Souza's marriage to Mrs. Souza? A. I do.

Q. Did you know him at that time? A. I did.

Q. Was it generally known among his friends, of whom you were one, that he had been married?

A. Yes, and I knew his family.

Q. Had you ever visited him at his home there?

A. Yes.

Q. You said that Mr. Souza was educated at a college in Honolulu? A. Yes.

Q. He impressed you as being educated?

A. He did not impress me; I knew it.

Q. You knew it? A. Yes.

Q. You knew that he was an educated married man? A. Yes.

Q. And an industrious man? A. Yes.

(Testimony of Antone Garcia.)

Q. You also told us that Mr. Souza occasionally worked as a hatch-tender? A. Yes.

Q. And that was a superior position, a higher position, than that of a stevedore? A. Yes.

Q. Because the hatch-tender is responsible for the crew down in the hatch. Is that right? A. Yes.

Q. How is he responsible? What does he have to do?

A. He has to look out for the tub coming out, and if any lumps go down he has to holler.

Q. Any lumps falling out of the tub or the hopper?

A. And if anything is coming toward the hatch, coming down, he is supposed to holler to them.

Q. Supposed to holler to the men in the hatch?

A. Yes.

Q. When you were working as a stevedore, did you work all the time?

A. Well, not all the time. For instance, I made my [46] living at it. Sometimes I used to work months and months, one after another, and once in awhile I would be away for three or four days, and if there was not any coal coming in I would go out and tackle something else.

Q. Your work, so far as unloading coal was concerned, depended on there being ships with coal there to be unloaded?

A. At the time I was stevedore, there used to be all kinds of ships of the Southern Pacific down at Long Wharf; sometimes we couldn't get them all.

Q. Sometimes there would not be any ships at all?

(Testimony of Antone Garcia.)

A. Yes, sometimes there would not be any ships at all.

Q. You don't know anything about how steadily Mr. Souza was employed for the last 13 years, do you?

A. No, not exactly; I could not probably say exactly to the minute what he done; occasionally you will see a man when he is working leave his house and come back from the coal place covered with coal or full of cement, or whatever else he was working with; more or less I can say he has been working.

Q. You would have to be pretty close to the man to know whether he was working?

A. He lives only two doors from me.

Q. Two doors from you?

A. No, three doors away from me.

Q. What have you been doing for the last 13 years?

A. I have been assistant agent for the Southern Pacific Company—not thirteen years, but ten years.

Q. You would not see Mr. Souza every day, would you? A. Pretty near every day.

Q. Do you want the Court to understand that you know that Mr. Souza has been working every day for the past thirteen years?

A. I don't say he has been working every day.

Q. Don't you think it would be a pretty fair average to say that he was working about two-thirds of the time? [47] A. Probably a little better.

Redirect Examination.

Mr. BRADLEY.—You have known this man how long, did you say?

(Testimony of Antone Garcia.)

A. I knew Souza for 30 or 32 years.

Q. Do you know how old he was when he lost his life?

A. I knew Souza was about 38 years old when he died—38 or 39, somewhere around there.

Q. By reason of knowing him since he was an infant, as you state, did you take any personal interest in him and his family?

A. I also knew him when he was a baby.

Q. Did you take any special interest in his family and its welfare?

A. No more than any other person I knew as well; generally when you are neighbors with a man you take an interest in him.

Q. Your knowledge of his habits and industry and family relations, as you have explained to the Court, were derived by reason of your long acquaintance with him, and your living neighbors to him?

A. Yes.

Testimony of Joe Costa, for Libelant.

JOE COSTA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live?

A. 541 Myrtle Street, Oakland.

Q. Where were you born?

A. Hawaiian Islands.

Q. How long have you been living in the United States? A. Thirty years.

Q. Are you a citizen of this country? A. Yes.

Q. What is your business? A. Stevedore.

Q. What was your business on August 5, 1916?

(Testimony of Joe Costa.)

A. I was a foreman of stevedores.

Q. Where were you working on that day, and who for?

A. For the Western Fuel Company, at the steamer "Tancred." [48]

Q. What time did you go to work in the morning, Mr. Costa? A. I was working from 7 to 12.

Q. You took a lunch time of how long?

A. I used to take lunch time from 12 to 1.

Q. You knew Manuel Souza, did you? A. Yes.

Q. Do you know what ship shift Manuel Souza was on that day?

A. He was on the morning shift, and he was supposed to relieve me from 12 to 1.

Q. Supposed to relieve you from 12 to 1?

A. Yes.

Q. What hatch was he working in in the morning?

A. On No. 4.

Q. What hatch did he switch to at noon?

A. No. 2.

Q. Why was that done?

A. On account of No. 2 having more coal than the rest of them, and they wanted to try to get the ship on so that she could sail.

Q. Before we go any deeper into this, I would like you to explain to the Court—I have here this picture which it is stipulated is a correct representation, and also I have here this which is an enlargement of this picture—I wish to give the Court the larger picture, and I think if you will keep this before you you can understand the explanation that this witness will

(Testimony of Joe Costa.)

give of just how the coal is unloaded. Will you explain to the Court just the method in which the coal is loaded into the buckets, then the way it is hoisted, how it is taken across the yard-arms and then how it is dumped and sent back?

A. I was in the No. 2 hatch, down there in the hold, working, and that boom that is sticking out, which has a little trolley that runs out there, that is the one that brings out the grab-bucket or tub which goes down in the hold and gets the coal and comes up and dumps it where that man is standing there; that is what they call the hoper, where the coal comes down and goes into the car underneath the hopper, down below where the wheels of the house is, way down here, [49] right on top of these rails; at the time we were working with tubs and the tubs came right up, and they have a man here who opens the catch of the tub and dumps the tub into that hopper where that man is standing, or a little lower, and it dumps in there, and it ain't supposed to do down.

Q. I think if you will look at picture 2, there in the large picture, you will see a man stationed right in there. What is that man doing?

A. That is in the middle of the tower.

Q. There is a man there? A. Yes.

Q. What is he doing there?

A. I don't know what he is doing at the present time, because they are working with hoppers at the present time.

Q. Is that man in the position he would be in if he was dumping the bucket? A. Yes.

(Testimony of Joe Costa.)

Q. Where does the engineer stay?

A. Right here on the next house, right alongside of the man that is dumping.

Q. The house with the windows? A. Yes.

Q. What machinery is that?

A. It runs by electricity.

Q. Is it in the form of a hoist or drum, something like that?

A. It has got two big drums in the back, it has falls around it, and he opens his two levers, which gives him the power to hoist it and lower it down.

Q. Manuel Souza had nothing to do with the operation of this machine at all?

A. No. I don't like to object, but I think that is a little too much leading.

Mr. HEIDELBERG.—Q. Do you know Harry Nelson?

A. I might know him by sight.

Q. As hatch-tender, you say it is your duty to look out for the men? A. Yes.

Q. What do you mean by that?

A. That is, to look out that they [50] do their work, and if there is anything out of order, to tell them what to do.

Q. Further, as to taking care of the men, for the protection of the men, what do your duties consist of?

A. We have to look out for anything that goes wrong with the coal; if there is anything going down we sing out to them to get out of the way, if they can, if anything comes out.

(Testimony of Joe Costa.)

Q. What do you mean, if anything comes out? Does that mean while the bucket is going out, or after the bucket has been dumped?

A. While the bucket is going up or down.

Q. While the bucket is going up or down?

A. You have to look out for them.

Q. You were the hatch-tender working on this ship at that time, were you? A. I was.

Q. It was your duty at that time, if you saw anything, to cry out?

A. It was my duty, if I saw anything, to sing out, but I was down below giving them a hand, so I didn't see it; but there was a man that was working for me who hollered ahead of time, and they couldn't get away.

Q. We will get at that later on. I wish to ask you if you did at that time see this coal coming down and yell out yourself, yell warning?

A. Not until after I heard some other hollering, and then I tried to get away myself, and I got hit myself, but it didn't damage me much; it was not only one lump that came down, but there was a great, big bucketful that went all over the hatch.

Q. What did this bucket consist of, what kind of coal?

A. It was Wellington coal, mostly all lumps.

Q. In other words, it was hand-loaded coal?

A. It was big, for the most part picked up by hand.

Q. Do you know what the duties of this man Nelson were previous [51] to August 5, 1916?

A. I could not tell you exactly what he was doing,

(Testimony of Joe Costa.)

but I seen him when he was upstairs working—working for the yard.

Q. Now, do you know whether or not August 5, 1916, was the first day he had ever worked on this bucket as dump man?

A. That was the first time I ever seen him dump.

Q. Did the hatch-tender give any signal for the raising of this bucket? A. They used a whistle.

Q. Did you blow a whistle for the bucket that day?

A. I blew a whistle to take it up.

Q. What time was it that that bucket was raised?

A. That was just about within a half a minute to twelve, when the lumps came down in the hatch; the whistle was blowing at 12 o'clock, sharp.

Q. The whistle was blowing at 12 o'clock sharp?

A. Yes.

Q. When the coal came down? A. Yes.

Q. Now, did any coal fall out of the bucket while that bucket was going upward? A. No.

Q. How far over from where it stopped after it was raised—you get my meaning—how far over did it have to travel on that yard-arm or boom into the hopper before it dumped?

A. Twenty-five feet.

Q. About 25 feet? A. Yes.

Q. The dump-man, do you know anything about his duties, from your association with him?

A. The dump-man?

Q. Yes, about how he is supposed to have the bucket into the hopper before it dumps? He is supposed to—

(Testimony of Joe Costa.)

A. To have it into the hopper before he dumps any.

Q. I believe you have worked as hatch-tender, have you not? A. Yes.

Q. In fact, you were working as hatch-tender on this day? A. Yes. [52]

Q. What are the wages for hatch-tender, as compared with a stevedore?

A. Six dollars a day; some firms do not pay that, but the most part of them they do.

Q. What did stevedores get working on August 5, 1916—what were their wages?

A. Five dollars, nine hours work.

Q. Since that time, has there been any increase?

A. There was a little increase a little afterwards; we have got a raise now.

Q. Is it the practice of stevedores to work overtime a great deal and Sundays?

A. They will work night and day if they can stand it.

Q. How long have you known Manuel Souza?

A. Ten years.

Q. What kind of a workingman was Manuel Souza? A. He was an all-around man.

Q. Was he a hard-working, industrious man?

A. He was what you would call a regular, hard-working man; he would take a job, and when he got through he would go around, if he had nothing to do, and look for something else; he was a man who liked to keep busy all the time.

Q. Did he work Sundays and holidays, to your knowledge? A. A great deal, yes.

(Testimony of Joe Costa.)

Q. Did he work as hatch-tender at any time that you know? A. Yes.

Q. How much time did he work as hatch-tender?

A. I couldn't exactly tell you; quite often he was working as hatch-tender.

Q. Was he an efficient workman as a hatch-tender, if you know? A. Yes.

Q. Did he do his work well as hatch-tender?

A. Yes.

Q. Can you give us any kind of idea what wages stevedores make unloading coal and cement and lumber?

A. If he is a good hustler to work, he can average all the way from $25 to $35 a week and sometimes over that, but to give an average all the way [53] through, year by year, they average $35 a week easy.

Q. How much do you average the year around?

A. I can average $45 a week.

Q. Was Manuel Souza a hard-working man, if you know? A. Very hard.

Q. Did he look for work? A. Yes.

Q. You look for work, too, I suppose?

A. I guess I do.

Q. Do you find any difficulty keeping busy?

A. I always do.

Q. You always do what?

A. Find something to keep me busy.

Q. You do not find any difficulty keeping busy; you mean you always keep busy; is that it?

A. Yes.

Q. Do you know Mrs. Souza?

(Testimony of Joe Costa.)

A. I know her, yes.

Q. What was the general reputation in the neighborhood, as to whether they were married, Mr. and Mrs. Souza?

A. I couldn't exactly tell you, but I believe they got married; I knew them after they got married.

Q. You know of his children? A. Yes.

The COURT.—Is there any serious question about this marriage?

Mr. PEART.—It has been disputed, but I do not think we will go into it any further. It has been merely formally. If the lady says she is married, that is the end of it.

Mr. HEIDELBERG.—We have a copy of the certificate. The original is not here. That is all.

Cross-examination.

Mr. PEART.—Q. Mr. Costa, you say that a hatchtender's duties are to look out for men down in the hatch below? A. Yes.

Q. And you gave the signal to hoist this particular bucket? A. Yes.

Q. About half a minute before 12 o'clock?

A. Yes.

Q. And you were down below, and not on the hatch? A. I was down below, yes. [54]

Q. Down with the men?

A. Down with the men.

Q. Now, you say that Mr. Souza was working at the time—did I understand you correctly?

A. Yes.

Q. Isn't it a fact that Mr. Souza went to lunch

(Testimony of Joe Costa.)

at eleven o'clock that day? A. He did, yes.

Q. How much time is allowed by the company for lunch? A. One hour.

Q. Was Mr. Souza in your gang?

A. No, he was in Frank Duarte's gang.

Q. He was in Frank Duarte's gang? A. Yes.

Q. Frank Duarte was the other hatch-tender, was he not? A. Yes.

Q. Had Frank Duarte's gang gone to work?

A. No, but this fellow Manuel Souza went in ahead of time, and took this other fellow by the name of Silva's place, because Silva wanted to change his shirt; you have to strip off down there before you go to work, you work awfully hard and sweat.

Q. Was Mr. Souza a friend of this man?

A. Yes.

Q. What was his name?

A. Gus Silva, they called them.

Q. So Mr. Souza, belonging to Frank Duarte's gang, came down ahead and took Silva's place while Silva went in and changed his shirt? A. Yes.

Q. Where was Silva wanting to go?

A. He was getting ready to go to lunch.

Q. He wanted to go to lunch himself, then?

A. Yes.

Q. Were the men working in coal right in the open hatch, or were they cleaning up the hold?

A. They were in the open hatch at the time.

Q. There was no coal right in the opening, was there?

A. There was coal under the opening, yes.

(Testimony of Joe Costa.)

Q. Weren't you using the buckets, instead of the grabs?

A. We were using the buckets instead of the grabs.

[55]

Q. Didn't the buckets have wheels on the bottom to roll over to the sides of the ship? A. Yes.

Q. So as to get the loose coal up on the sides of the ship?

A. Yes, if it was necessary to go there; it is not necessary when it is in the hatch, they fill up there and haul it from there.

Q. How did Souza go down into the hatch?

A. Went down a step-ladder as they have it fastened to the ship.

Q. There is a ladder there that goes right down to the ship, is there? A. Yes.

Q. I will show you a photograph taken of the steamer "Tancred." Now, does that show the hatch down below the bucket? You are looking right down at it like that. A. This is the hatch.

Q. There is the open hatch? A. Yes.

Q. Here is the bucket in the air, coming up to the boom?

A. Yes, this tub is going up; then after it gets up here, it is supposed to come in here and dump in here.

Q. That is the correct position of where the dumpman stands? A. Yes.

Q. This is the hopper right below?

A. This is the hopper right in front of him.

Q. Where is the ladder that went down into the hatch, that Souza went down on?

(Testimony of Joe Costa.)

A. You have not got it here.

Q. But where would it be?

A. It is supposed to be placed on the after part of the hatch.

Q. Toward the stern? A. Toward the stern.

Q. It would be right in there, then (pointing)?

A. It was supposed to be right on the after part of the hatch, right straight on the bottom?

Q. Now, did you see Souza come down the ladder?

A. Yes.

Q. Where was the bucket? Had it started up when he was coming down?

A. At the time that the accident happened he was working, [56] he was taking this fellow Silva's place, while the other man was changing his shirt—he had already come down the ladder.

Q. He had already come down the ladder?

A. Yes.

Q. How long before had he come down the ladder?

A. About ten minutes before time.

Q. About ten minutes ahead of time? A. Yes.

Q. You had known that Souza acted as a hatch-tender a good many times? A. Yes.

Q. You did not see any coal falling yourself?

A. Not until it was down in the hatch.

Q. You got his yourself with some coal?

A. Yes.

Q. Stevedores' wages are now $6 a day, but at the time Mr. Souza was killed they were getting $5 a day?

A. At the time he got killed he was getting $5 a day, but now we get $6.75 a day.

(Testimony of Joe Costa.)

Q. Is it not your opinion, Mr. Costa, that a stevedore, year in and year out, puts in about two-thirds of his time working, and the other third of his time there is no work for him to do?

A. Well, there is some of them puts in two-thirds, and some about three-quarters of the time.

Q. From what you knew of Mr. Souza, and your acquaintance with him, assuming, as I understand you, his earnings are $35 a week, including overtime, wouldn't you estimate that he got in about two-thirds of the working time in a year?

A. Probably a little over.

Q. How much over? A. I couldn't exactly tell.

Q. I want to be fair with you, but didn't you so testify before W. H. Pillsbury, general referee, at room 211 of the City Hall, Oakland, California, on September 5, 1916, at 1:30 o'clock P. M., in answer to a question propounded by either the referee or one of the counsel:

"How much would it average year in and out?

A. I cannot [57] tell you exactly what, but I figure about $10 a week overtime all the year around.

"Q. For two-thirds of the year?

A. Yes, sir.

"Q. Altogether, then, you would estimate his earnings at $35 a week, including overtime, for two-thirds of the year? A. Yes, sir."

Didn't you testify that way on that occasion, Mr. Costa?

(Testimony of Joe Costa.)

A. At the time I thought you were asking me at the present time that we were working.

Q. No, I am talking as you knew Souza during your acquaintance with him.

A. You did't ask me as I knew Souza; you didn't say that at all.

Q. Isn't that the fact, that you testified that way, or do you want to change that now in any way?

A. How do you mean?

Q. Didn't you so testify, as I stated, that Mr. Souza got in only about two-thirds of the year at $35 a week, including overtime and that you would estimate that as being his earnings?

A. At that time I testified, but when you asked me this second question you did not ask me at the time that I knew Mr. Souza, so I thought that you were asking me some different thing, and I answered it different.

Q. You think, then, he got in about two-thirds of the year at $35 a week, including overtime?

A. At the time I knew him.

Q. What do you estimate Mr. Souza's earnings were, Mr. Costa?

A. My estimate of Mr. Souza's earnings is, including overtime and everything, two-thirds of the year, and probably more—what more I don't know.

Q. The hatch-tender looks out for the men, for the bucket itself coming down, for coal falling out of the bucket and coal falling out of the hopper?

A. He says, in case he sees the coal coming out of the hopper.

(Testimony of Joe Costa.)

Q. If he sees it coming? A. Yes. **[58]**

Q. His business is to look out for his men?

A. Yes.

Q. And coal does fall out of the buckets as they go up, does it not? A. Very seldom.

Q. Very seldom. A. Yes.

Q. Does it fall out of the hopper once in a while?

A. Yes.

Q. In other words, there is always danger to men down in the hatch, isn't there. A. Yes.

Q. And that is one of the reasons the hatch-tender is there watching it? A. Yes.

The COURT.—How much coal fell at this particular time?

A. I couldn't exactly tell, but it scattered all over the hatch.

Mr. HEIDELBERG.—Could you estimate it? Was it half a bucket or three-quarters of a bucket?

A. The way it came down it must have been half a bucket, and probably more.

Q. Do you suppose you would have half a bucket?

A. It scattered all over the hatch, and it must have been.

The COURT.—Is it a usual thing to have a half bucket of coal fall down from the hopper or from the bucket?

A. It came down as if the man that was dumping or the engineer didn't do it right; it is possible for whole buckets to come down sometimes.

Q. I know, but is that usual? A. No.

(Testimony of Joe Costa.)

Mr. PEART.—Q. It does happen, however, does it, Mr. Costa?

A. That a half bucket of coal comes down?

Q. Yes. A. No.

Q. You never saw that happen? A. No.

Q. Didn't you just say a minute ago you have seen a whole bucket come down?

A. I said that as it came down it looked as if it was half a bucket or more that came down.

Q. How many times have you seen coal drop down?

Mr. HEIDELBERG.—I ask that that question be more specific. **[59]** A. That I couldn't tell.

Mr. PEART.—Q. After or before the accident—it don't make any difference.

Mr. HEIDELBERG.—I object to the question.

The COURT.—The objection is overruled.

A. Well, I have seen it sometimes, and sometimes I have seen nothing.

Mr. PEART.—Q. This was very big coal, was it not? A. Yes.

Q. Lumps about how big? A. All sizes.

Q. Mostly big lumps, weren't they, however?

A. Yes, mostly big lumps.

Q. You never acted as a dump man yourself, did you? A. A good many times, yes.

Q. Just what does the dump man do?

A. The one that stands there, he takes the bucket into the place where he wants to dump it and makes sure that he has got it in so as not to go down on the hatch and hurt the men.

(Testimony of Joe Costa.)

Q. Did you ever have any spill on you? A. No.

Q. Mr. Nelson was switching cars around the yard, was he?

A. That I couldn't tell you, what he was doing.

Q. You don't know what he was doing?

A. At the time he was dumping.

Q. You don't know whether or not he was a switchman in the yard, handling electric cars?

A. That I don't know.

Q. As I understand you, Mr. Souza was a very smart man? A. He was, yes.

Redirect Examination.

Mr. HEIDELBERG.—Q. Was that the last bucket that you were to send up on your shift?

A. Yes.

Q. You were just quitting work at that time?

A. Yes.

Q. Did you consider it was time for you to quit work at that time? **[60]** A. Yes.

Q. What is the custom of stevedores when they are working coal, as to going down into the hold a few minutes early?

A. That is when they want to go down to change their clothes, so as to be ready to go to work on time.

Q. What time, for the sake of repetition—what time did you say that this accident actually happened?

The COURT.—Why for the sake of repetition?

A. At twelve o'clock sharp.

Mr. HEIDELBERG.—Q. Now, what are the highest wages you heard of stevedores making, working

(Testimony of Joe Costa.)

overtime; just give us the figures.

The COURT.—You mean since this occurrence, or at the time?

Mr. HEIDELBERG.—About the time of this accident, and previous to that time, what were some of the wages you had heard of stevedores making working overtime and Sundays?

A. At the time Mr. Souza got hurt?

Q. Yes, or a little previous to that.

A. $35 a week.

Q. Around about $35 a week. A. Yes.

Q. Those men who looked for work were making $35 a week: Is that right? A. Yes.

Testimony of Manuel Reposa, for Libelant.

MANUEL REPOSA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live?

A. 23d Avenue, East Oakland.

Q. On August 5, 1916, were you at work as a stevedore in the steamer "Tancrid" for the Western Fuel Company? A. Yes.

Q. Did you know Manuel Souza?

A. I knew him since he worked on the boat that I was on.

Q. What time did you go to work that morning?

A. Seven o'clock.

Q. When were you to take lunch?

A. Twelve o'clock. **[61]**

Q. Was Mr. Souza on your shift?

(Testimony of Manuel Reposa.)

A. Yes, he was on that side, and I was on this side.

Q. You say you were going to lunch at twelve o'clock? A. Yes.

Q. Was Manuel Souza to go to lunch at twelve o'clock?

A. He was working on the other side; he was supposed to go and work and take the other fellow's place—he went at eleven o'clock.

Q. In other words, the shifts changed there?

A. They had to change there; he had to take the other fellow's place.

Q. At the time of this accident, where were you standing?

A. I was down in the hold right this side of him.

Q. What were you doing, were you quitting, or were you going to work?

A. I was waiting there to go up and have dinner.

Q. Waiting to go up and have your lunch?

A. Yes.

Q. Were you looking upward? A. Yes.

Q. You saw these buckets go up? A. Yes.

Q. What bucket was that that went up?

A. It was a bucket all full of big lumps, all filled by hand.

Q. But was it a bucket that was sent up by the shift that was just quitting? A. Yes.

Q. Did you follow this bucket in its ascent and course?

A. Yes, I followed it; I was looking up all the time to see if it went to the hopper.

(Testimony of Manuel Reposa.)

Q. You saw the bucket go up to the top?

A. Yes.

Q. Will you please tell what you saw then?

A. I saw the bucket when it goes halfway in, and when the fellow pulls out the hook, half goes in and half goes out.

Q. How far did this bucket go into the hopper before it was dumped?

A. It went about four feet in.

Q. How far did this bucket go in?

A. It is supposed to go *in more in it.*

Q. How far is the bucket supposed to go in?

A. It is supposed **[62]** to go—I don't know the size of the hopper on top, I never have been up there.

Q. But in your opinion: You have watched this a number of times, haven't you? A. Yes.

Q. How far do you say a bucket goes in before it is supposed to be dumped?

Mr. PEART.—Objected to as immaterial, irrelevant and incompetent, no proper foundation laid for the question.

The COURT.—Objection overruled.

Mr. HEIDELBERG.—Q. How long were you a stevedore previous to this accident?

A. I worked about three months.

Q. Had you often watched this bucket being dumped? A. Yes.

Q. You became very familiar with the way the bucket was dumped, as far as you could see?

A. Yes.

(Testimony of Manuel Reposa.)

Q. How far do you say that this bucket generally goes in?

Mr. PEART.—The same objection.

The COURT.—Overruled.

Mr. HEIDELBERG.—Q. How far did this bucket go in when it was dumped?

A. About four feet it went in; I couldn't tell you exactly, because I never was up there; I was down in the hold and was looking up.

Q. To the best of your knowledge, what happened when the bucket went in?

A. The bucket goes halfway and then it turns back.

Q. Started back?

A. And then dumped all the coal right down.

Q. Dumped the coal down where?

A. Down in the hold, where we were working; the bucket is supposed to go way in and dump it right in.

Q. This bucket did not go way in?

A. That is right.

Q. Do you know Manuel Souza?

A. I know Souza since he was working with me on the coal.

Q. What kind of a man was he, a hard-working man?

A. I couldn't **[63]** tell you exactly; he was a good man since I worked with him.

Q. What warning was yelled, if any, by anyone, if you know?

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent.

(Testimony of Manuel Reposa.)

Mr. HEIDELBERG.—Q. Did you see this coal coming down? A. Yes.

Q. Did you give any warning A. Yes.

Q. What did you say?

A. I said, "Look out."

Q. Then what did you do?

A. I ran myself, right between the buckets.

Q. Where was Manuel Souza at that time?

A. Manuel Souza was on that side, on the other side of me.

Q. Do you know about what time this was that this coal came down? A. I couldn't tell exactly.

Q. Do you know what time?

A. The whistle was blowing already when the coal hit him on the head.

Q. You say all the crew were just shifting at that time? A. Yes.

Cross-examination.

Mr. PEART.—Q. Mr. Souza did not belong to your gang, did he? A. How do you mean?

Q. Was Souza in your crew, your shift?

A. Yes, he was in my shift.

Q. Souza was not in your gang? A. No.

Q. You were in Costa's gang? A. Yes.

Q. Souza was in Frank Duarte's gang?

A. Yes.

Q. Costa's gang was working on Hatch No. 2 between 11 and 12 o'clock on that day, was he?

A. Yes.

Q. And Souza belonged to Duarte's gang and Duarte's gang was going to work at twelve o'clock?

(Testimony of Manuel Reposa.)

A. Yes.

Q. Why was Souza down there?

A. Souza was down there to take the other fellow's job. **[64]**

Q. That is, Silva's? A. Yes.

Q. He wanted to let Silva go to lunch?

A. Yes.

Q. Did Silva call out to him and ask him to come and take his place?

A. No, he didn't call; he just was going down.

Q. He went to work after the whistle was blown?

A. The whistle was blowing already.

Q. Twelve o'clock noon?

A. Twelve o'clock the whistle was blowing.

Q. He went down and began work?

A. He didn't work right away, because he had to take his shirt off, and when the tub comes up then he starts to work.

Q. Costa's gang were all in there, weren't they?

A. Yes, Costa's gang were all in there.

Q. None of Duarte's gang were in there but Souza?

A. There were some coming down on the ladder.

Q. But nobody but Souza was down there?

A. Yes.

Q. He was the only one that was down there?

A. Yes.

Q. You were going up the steps?

A. No, I was not going up. I was right by my car.

Q. Costa's gang had not gone up the ladder yet?

(Testimony of Manuel Reposa.)

A. No.

Q. When you change gangs, don't everybody change at the same time?

A. You can't tell what time you are going to change.

Q. When they change the gangs, don't your engineman, and dumpman, and the hatch-tender, and the stevedores all change together?

A. Sure, they have to change.

Q. They all change together, don't they?

A. They change if they have got men enough to change.

Q. When you were coming up the ladder you saw this bucket dump half in and half out? A. Yes.

The COURT.—He did not say when coming up the ladder. He said down below. **[65]**

A. I was right down there. I misunderstood him.

Mr. PEART.—Q. You had not started up the ladder yet? A. No.

Q. You were standing down in the hold?

A. I was standing in the hold.

Q. You saw the bucket go up, watched it?

A. I watched the bucket go up.

Q. You saw it dump half in the hopper and half out of the hopper? A. Yes.

Q. Did you see the dumpman at all?

A. I saw the man, yes.

Q. Did you see him do anything to the bucket?

A. I saw him pull the rope and dump half in and half out.

Q. You saw him pull the rope? A. Yes.

(Testimony of Manuel Reposa.)

Q. And dump half in and half out? A. Yes.

Q. How big is that hopper?

A. I couldn't tell you, because I have never been up there.

Q. Do you know where the dumpman stands

A. Yes.

Q. Does that picture show where he stands?

A. There is the dumpman.

Q. Can you see him there? You are looking down on the boat here.

A. I can't tell exactly whether that is the right man or not.

Q. Right there, is that where the dumpman stands? A. Yes.

Q. That is where he stands?

A. This bucket is supposed to go way inside there, and the bucket, when it goes over there, the engineer is supposed to pull it all the way in, and no coal comes down; but he dumped when it was half way in.

Q. Where was the dumpman standing?

A. The dumpman was right here.

Q. Right where this man is?

A. I don't know who that man is there.

Q. But in the same place where that man is?

A. He couldn't **[66]** be there, because if he goes over there he might fall overboard; he is supposed to be more inside.

Q. He is supposed to be more inside than that?

A. Yes.

Q. Now, from where you were in the hold, you could see the dumpman dump the bucket?

(Testimony of Manuel Reposa.)

A. Yes, because I was on the outshore.

Q. You were on the outside part of the hold?

A. No, I was on this side, outshore.

Q. Furthest away from the bunkers?

A. No; right between my bucket and between the other fellow's bucket, too.

Q. You were in the hold?

A. I was in the hold.

Q. You could see the dumpman dump this bucket?

A. Yes.

The COURT.—What are the dimensions of the hatch?

Mr. PEART.—I think about 30 feet; I am not positive.

Mr. HEIDELBERG.—15 by 30, I think.

Mr. PEART.—Q. You only have been working as stevedore about three months?

A. That is all.

Redirect Examination.

Mr. HEIDELBERG.—Q. Do you know where Mr. Mendoza was at that time?

A. Mr. Mendoza was by the step.

Q. On what shift, what gang was Mendoza?

A. Frank Duarte's.

Q. He was on Frank Duarte's gang? A. Yes.

Q. He was on the same gang that Souza was, then?

A. Yes.

Q. What gang was Mr. Lima on?

A. Frank Duarte's gang.

Q. You say Lima was on Frank Duarte's gang?

A. Yes.

(Testimony of Manuel Reposa.)

Q. Where were these men at the time?

A. I couldn't tell you exactly, because I didn't see them. I know Mendoza was by the steps.

Q. Downstairs or upstairs? A. Downstairs.

Q. He was down in the hold?

A. He was in the hold.

Q. What do you know about the custom of stevedores when they are working coal as to when they go down to work? [67]

A. I can't tell that, because I was not working very long on that job.

Testimony of August Silva, for Libelant.

AUGUST SILVA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live, Mr. Silva?

A. Oakland, 1150 Eighty-second Avenue.

Q. What is your business? A. Stevedore.

Q. How long have you been stevedore?

A. Off and on, about 18 years.

Q. Were you working on the steamer "Tancrid" for the Western Fuel Company on the day Mr. Souza met his death? A. Yes.

Q. What time did you go to work in the morning?

A. Seven o'clock.

Q. What time were you supposed to go to lunch?

A. Twelve.

Q. Do you know what shift Mr. Souza was on?

A. I understand Mr. Souza was supposed to go to lunch at 11 o'clock.

Q. What time did you quit work for lunch?

(Testimony of August Silva.)

Mr. PEART.—I move to strike out what Mr. Souza was supposed to do.

Mr. HEIDELBERG.—We will agree to that.

Q. What time did you go to lunch that day?

A. I was supposed to go to lunch at 12 o'clock.

Q. What time did you go to lunch?

A. In fact, I didn't have no lunch at all that day.

Q. I know, but when this accident happened, who relieved you that day? A. Mr. Duarte's gang.

Q. Mr. Duarte?

A. Frank Duarte's gang relieved us.

Q. Who in particular relieved you that day?

A. I think Mr. Mendoza was the one to relieve me.

Q. Do you know who Mr. Mendoza's partner was?

A. Manuel Souza.

Q. Had you quit when this accident happened?

A. When this accident happened I was going back to the wing to get [68] my coat and quit; I sent the last tub up.

Q. How long before the accident happened had you quit work, just as near as you can figure it, half a minute, or two minutes?

A. I guess about half a minute. Just time for the tub to go up and come down.

Q. Did you see the bucket go up?

A. No, I didn't see it, I had gone into the wing to get my clothes, to go off.

Q. What do you know about the custom of stevedores, when they are working coal, as to going down into the hold?

(Testimony of August Silva.)

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—It seems to me if a man is going to be relieved at twelve o'clock the other man has got to be there at 12 o'clock.

Mr. HEIDELBERG.—We want to show that there is a well-recognized custom of which the Western Fuel Company must have been aware that the men went down in the hold a minute or two before, in order to change their clothes.

The COURT.—The objection is overruled.

Mr. HEIDELBERG.—Q. What clothes do you use in working coal?

A. What we call a soft shirt.

Q. Do you have to do any changing before you go out to lunch? A. Yes.

Q. And after you come back from lunch?

A. We would have to change after we came back again.

Q. Where was Mendoza at that time?

A. Mendoza was near the ladder.

Q. In the hold? A. In the hold.

Q. Do you know Mr. Lima? A. Yes.

Q. Where was he at that time?

A. That I don't know.

Q. Where was Mr. Fernandez at that time?

A. I don't know; I was down in the hold. [69]

The COURT.—You don't know how many of Duarte's gang had got in there?

A. I know for sure there were two; there was Mr. Mendoza and this man Souza, sure.

(Testimony of August Silva.)

Q. Two or three?

A. Two or three I know for sure.

Mr. HEIDELBERG.—Q. You did not see this bucket dumped from where you were?

A. No.

Q. Did you see the coal coming down?

A. Well, I saw them all run; as a rule, when a man starts to run they all run, and I rang in the wing, and the coal came down.

Q. Did you hear any warning prior to that?

A. If there was any warning, I was excited, I never noticed it.

Q. What did you do when this coal came down—afterwards? Did you see Mr. Souza?

A. I ran over to the pile there and seen Mr. Souza laying there; he was dead. I put my hand on his head and tried to stop the circulation of the blood running, and his brains and blood was running out through my fingers.

Q. Then what did you do?

A. I hollered to the men down there, I said, "Boys, give me a hand to get him out of the hold."

Q. Then what did you do?

A. I went in the tub and Mr. Costa helped me, and we took him out of the hold.

Q. You took him up in a bucket? A. Yes.

The COURT.—I suppose he was killed by that coal. No doubt about that.

Mr. HEIDELBERG.—Q. How long have you worked as a stevedore?

A. I guess about 18 years, off and on.

(Testimony of August Silva.)

Q. In your experience, did you ever notice much coal to be thrown back into the hold of a vessel before that time? A. No.

Q. Never knew of it? A. No.

Q. What was the custom of stevedores after a bucket goes into the hopper?

A. After the bucket they goes up in the air they leave it up to the hatch-tender to look after it, and as a [70] rule they go on and fix up the pile for the next tub to come down and get the coal in.

Q. Is that what Souza was doing at the time?

A. That is what Mr. Souza was doing at the time.

Q. You don't know whether it was Mendoza or Mr. Silva that relieved you?

A. They generally relieve the right-hand man and left-hand man; on the right hand, Mr. Mendoza is supposed to have relieved me, as I was the right-hand man, and Mr. Souza was supposed to have relieved my partner.

Q. Those two men were to relieve you?

A. Those two men were to relieve us.

Q. And they were both down in the hold at the same time? A. They were both in the hold.

Cross-examination.

Mr. PEART.—Q. How are you paid as a stevedore?

A. During the time of Mr. Souza?

Q. No; how do you get your pay as a stevedore. By the hour, is it not?

Mr. BRADLEY.—I object to that as not proper cross-examination.

(Testimony of August Silva.)

Mr. PEART.—Q. You get paid by the hour, don't you? A. Yes.

Q. Once in awhile you boys help each other out, if you have got any particular errand to do, by taking the other man's place for a few minutes before the shift changes? A. Yes.

Q. Souza came down there to take Frank Silva's place, or was it yours?

A. Silva's—Gus Silva's.

Q. He came down there a little ahead of time to take Gus Silva's place, didn't he? A. Yes.

Q. Gus would get paid by the hour, wouldn't he?

A. Naturally he would.

Q. From 11 to 12 Gus would get the money?

A. Yes.

Q. But Souza, as a matter of kindness, took his place for the [71] last minute or two?

A. In the last minute, to give him a chance to get his clothes on.

The COURT.—Do I understand it is your contention that while they might not have the right to kill Gus Silva they would have the right to kill Souza for taking his place?

Mr. PEART.—No, I do not intend to make that contention, but later on its materiality will appear more clearly.

Q. Have you ever noticed coal falling from buckets when they went up? A. Yes.

Q. In you eighteen years' experience? A. Yes.

Q. It is rather a common thing, isn't it?

A. Well, it is pretty common.

(Testimony of August Silva.)

Q. Pretty common? A. Yes.

Q. You never saw as much coal as that fall?

A. Not at one time, no.

Q. Have you seen coal pretty nearly as much as that fall?

A. I have seen a lump of coal come down; yes.

Q. You have seen two or three lumps come down at a time, haven't you? A. Yes.

Q. And falling coal is always dangerous, isn't it?

A. Yes, I suppose so.

Q. If you got hit on the head with any of that you saw fall, you would be killed, wouldn't you?

A. Some of it would kill you and some would not.

Q. In other words, when you are working there in the open hatch, if any of the coal falling would hit you it would be a bad injury and it might kill you?

A. Yes.

Q. It is something you have go to watch every minute, is it not?

A. The workingmen aren't supposed to watch, it is up to the hatch-tender.

Q. The hatch-tender is supposed to watch?

A. Yes. **[72]**

Q. You men that are working there, with your lives dependent on it, depend on the hatch-tender's warning, don't you?

A. Yes, the hatch-tender's warning.

Q. Do you know that Souza was the hatch-tender himself for quite awhile?

A. I worked for Souza myself.

(Testimony of August Silva.)

Q. You worked under him while he was hatch-tender? A. Yes.

Q. How many times? A. Quite a few times.

Q. Did you see Costa downstairs there with the rest of your crew? A. Costa was downstairs.

Q. What was he doing down there?

A. He was standing up, as far as I know.

Q. Does the hatch-tender stand down below sometimes, as well as up on deck?

A. They take their chances on that; sometimes they like to be down there, and sometimes like to be up above; sometimes they go down and help bring the tubs out.

Q. Was he helping you with the tubs? A. No.

Q. He was just standing there, performing his duty down below? A. Yes.

Q. I want to show you a picture of the "Tancrid." Does that look like the "Tancrid" there? A. Yes.

Q. There is the bucket up in the air? A. Yes.

Q. The hopper is up in here? A. Yes.

Q. And the open hatch down here? A. Yes.

Q. Now, I will show you another photograph; that is the "Tancrid" lying here? A. Yes.

Q. There is the bucket in the air and there is the boom? A. Yes.

Q. Is that a good representation of the hopper?

A. Yes.

Q. Is that where the man stands that dumps buckets, where that man is standing?

A. Yes, where he stands, usually.

(Testimony of August Silva.)

Q. About how far in is that man from the edge of the hopper?

A. It is up to the man; sometimes they go right to the edge, and [73] sometimes they go inside about four or five feet, inside of the hopper.

Q. Do you know how wide that hopper is, as a matter of fact. A. No.

Q. From the bunkers up? A. No.

Q. You know it is about 15 feet?

A. I would not say. I offer that in evidence.

Q. Was there coal right in the hatch, or were the men picking it up out in the wings?

A. The coal was in the hatch.

Q. There was coal there to be handled in the hatch?

A. There was coal in the hatch to be taken out.

Redirect Examination.

Mr. HEIDELBERG.—Q. Did you request Mr. Souza to relieve you at this time? A. No.

Q. You have already stated you were relieved either by Mr. Souza or Mr. Mendoza?

A. Mr. Souza relieved my partner, Gus Silva; his name is Gus Silva, too; he relieved him, and I was waiting to bring my tub up, to get my coat to go to lunch, so I waited until they hooked on my tub and sent it up in the air.

Q. When does your overtime, if at any time, start?

A. After five o'clock.

Q. After you are supposed to be through work?

A. Yes.

Q. If the bucket had gone into the hopper and had

(Testimony of August Silva.)

been properly dumped, do you consider that there is any danger of falling coal after that time?

A. No, not if properly dumped.

Testimony of Joe Mendoza, for Libelant.

JOE MENDOZA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. Where do you live?

A. 537 Filbert St., Oakland.

Q. What is your business?

A. Stevedore. [74]

Q. Were you at work on the steamer "Tanerid" for the Western Fuel Company on August 5, 1916?

A. Yes.

Q. Did you know Manuel Souza? A. Yes.

Q. Who was your partner on that day?

A. Manuel Souza.

Q. What time were you supposed to go to lunch?

A. At 12 o'clock.

Q. At 12 o'clock.

A. We were supposed to go to lunch at 12, but we went to lunch at eleven.

Q. You were down in the hold at the time of this accident, were you? A. Yes.

Q. Who else was down there of your gang, if you know?

A. Well, I couldn't remember now who was there.

Q. Do you know Mr. Lima?

A. I know Mr. Lima.

Q. Was Mr. Lima there?

A. Mr. Lima was there.

Q. Did he belong to Frank Duarte's gang?

(Testimony of Joe Mendoza.)

A. I don't think so; I can't remember, it is so long; I can't remember who was down there.

Q. But you were there? A. Yes.

Q. You had gone to work when this accident happened? A. Yes.

Q. Did you see this bucket go up?

A. I did see it go up.

Q. Did you see it after that? A. No.

Q. Did you hear anyone cry any warning?

A. I did.

Q. What did you do? A. I run.

Q. What, if anything, happened to you?

A. It broke my leg.

Q. You didn't see the way this bucket was dumped? A. No.

Q. What time was it that the accident happened?

A. Just about twelve o'clock.

Cross-examination.

Mr. PEART.—Q. Had you gone to relieve somebody, Mr. Mendoza? A. Yes.

Q. Who was the man that you relieved?

A. I was supposed to relieve Mr. Silva.

Q. The man who has just testified?

A. Yes. [75]

Q. You were on your way down?

A. No, I was down in the hold.

Q. You were down in the hold? A. Yes.

Q. Do you know whether, when gangs are changed, the engineer, the dumpman, the hatch-tender and the crew all change together?

A. They are all supposed to.

(Testimony of Joe Mendoza.)

Q. They are all supposed to change together?

A. They are supposed to change when the whistle blows at 12—they are supposed to be relieved and they are supposed to all change.

Q. In other words, the dumpman, the engineer and the crew are all a part of one gang? A. Yes.

Q. You had gone down, and Souza had gone down ahead of twelve o'clock? A. Yes.

Q. Do you know anything about whether it is common or otherwise for coal to fall out of the bucket?

A. No.

Q. Does coal commonly fall out of the bucket, does it happen often? A. No, once in a great while.

Q. That is a part of the hatch-tender's job, to keep you advised as to that? A. Yes.

Q. So as to look out for it? A. Yes.

Q. That falling coal is dangerous, when it falls out?

A. Sometimes it is dangerous; if you are in the way; if you are out of the way it ain't dangerous.

Q. If it hit you it would be dangerous?

A. Certainly.

Q. These were big lumps? A. Yes.

Redirect Examination.

Mr. HEIDELBERG.—Q. When this bucket goes into the hopper, how is it as to falling coal?

The COURT.—Does coal usually fall after the bucket has got into the hopper?

Mr. HEIDELBERG.—Q. Does the coal fall out of the bucket [76] after it has gone into the hopper?

A. Sometimes it happens.

(Testimony of Joe Mendoza.)

Q. Did you ever see any amount of coal like this fall out of a hopper before? A. Not in my life.

Q. Never in your life before? A. No.

Q. Did this coal seem, in your opinion, to fall quickly?

Mr. PEART.—I object to that.

Mr. HEIDELBERG.—I will withdraw that.

Mr. PEART.—Q. You never have seen as much coal as that fall out of the hopper, but you have seen coal fall out of the hopper?

A Well, once in awhile a lump or so.

Q. Come down out of the hopper? A. Yes.

Mr. HEIDELBERG.—Q. How much coal do you suppose fell this time, if you know?

A. I couldn't say.

Testimony of Antone Lima, for Libelant.

ANTONE LIMA, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. What was your business on August 5, 1916, the date of this accident?

A. I can't talk English.

Q. Do the best you can. Did you know Manuel Souza? A. I know him for awhile.

Q. You knew him the day he was killed?

A. I knew him when he was killed.

Q. Where were you working at that time?

A. I worked in Frank Duarte's gang.

Q. On the steamer "Tanerid"?

A. "Tanerid," yes.

Q. Where were you at the time of this accident?

A. I was alongside of the ladder; you see I just

(Testimony of Antone Lima.)

began shoveling to fill my tub.

Q. You just started to fill your tub, to go on the work? A. Yes.

Q. Were you on the same gang as Mr. Souza?

A. Yes.

Q. And Mr. Mendoza? A. Yes. [77]

Q. You were down in the hold of the ship?

A. Yes.

Q. Did you see this bucket go up in the air?

A. No, I didn't see it.

Q. Did you hear any warning, anybody yell out?

A. Yes, I heard somebody holler, and I ran away.

Q. Did you see the coal coming down?

A. No, I never looked at it.

Q. Do you know what time it was this accident happened? A. Just as the whistle blowed.

Cross-examination.

Mr. PEART.—Q. Were you going down to relieve some friend? Did you take somebody else's place?

A. Yes.

Q. The other man got the money for that 11 o'clock to 12? A. Yes.

Q. You got paid by the hour, didn't you?

A. Yes.

Q. You didn't get any pay for working before 12 o'clock? A. No.

Q. Mr. Costa's gang was still there? Mr. Costa was in charge of it, was he not?

A. Mr. Costa is quitting at that time.

Q. He was just quitting? A. Yes.

(Testimony of Antone Lima.)

Q. But this was the last bucket on his shift, was it not? A. Yes.

Q. Mr. Duarte was the hatch-tender when the coal fell? A. Yes.

Q. Mr. Duarte did not tell you to go to work?

A. Yes—the whistle had blown.

Q. The whistle had not blown?

A. It had blown.

Q. But Mr. Costa's gang was still there?

A. Yes, was still there, because they didn't get no chance to go up yet; they waited for a chance to go up.

Testimony of Frank Duarte, for Libelant.

FRANK DUARTE, called for the libelant, sworn.

Mr. BRADLEY.—Q. What is your business?

A. My business?

Q. Your occupation?

A. Rigger and stevedore. [78]

Q. How long have you been a stevedore?

A. About 15 years.

Q. Have you worked the greater part of the time in coal? A. I was working over here in Oakland.

Q. On coal? A. On coal, yes.

Q. What was your occupation on the 5th of August, 1916, at the time Manuel Souza lost his life?

A. I was running a gang of stevedores.

Q. Were you hatch-tender? A. Yes.

Q. What was the hour that the gang that you were in charge of was to go to work?

A. The hour was from 11 to 12.

(Testimony of Frank Duarte.)

Q. Now, at what time was it that this man lost his life, Souza? A. Manuel?

Q. Yes. A. Well, it was about near 12.

Q. Did he belong to your crew? A. Yes.

Q. Was your crew just going to work at that time?

A. Just was ready to go to work.

Q. They were shifting crews? A. Yes.

Q. Was the whistle blowing, or had it blown?

A. Well, at the time Manuel got killed, it was just getting 12 o'clock, the whistle blowing.

Q. Where was Costa, the man who had charge of the crew before you?

A. He was down in the hold with his gang.

Q. How many men were in your crew?

A. Mine?

Q. Yes. A. There were nine with me.

Q. How many of those men in your crew had gotten down into the hold?

A. Well, the men that were down below in the holds were about six men, I think, because I had two on deck yet with me.

Q. Who were up on the deck?

A. I was on the deck yet.

Q. Six had gone down?

A. Six was down, I think.

Q. Did you see this bucket of coal come up, the one that came [79] back and dumped the coal on Souza? A. Yes, I saw it.

Q. Did you see it after it reached the cross-piece, and did you see it go over into the bunker?

A. Yes, it went right into the bunker.

(Testimony of Frank Duarte.)

Q. Did it go out quickly or slowly?

A. Well, at the time I watched it I saw the bucket went in, and at the same time she swung a little bit outside and the coal came down a little bit.

Q. It came back spilling coal?

A. Yes, it spilled coal coming out.

Q. Did you notice how far it went into the hopper?

A. When I saw it, it was away in already.

Q. Then it came right out dumping coal?

A. Yes, because the coal came down.

Q. How far were you from the hatch?

A. I was close to the hatch.

Q. Did you give any warning?

A. No; I was watching myself, too.

Q. In your experience as a stevedore and hatch-tender, how long have you been a stevedore and hatch-tender?

A. Well, this last time I am about a year and a half, I think.

Q. How long have you been stevedore?

A. About 15 years.

Q. Have you seen coal fall out of a bucket after it has gone into the hopper and was properly dumped?

A. I see sometimes, once in awhile.

Q. After it has been dumped? A. Yes.

Q. As a hatch-tender, do you watch the bucket after it is dumped, or as it goes up?

A. We have to watch it when it goes up.

Q. After it gets up and gets over to the bunker, then you do not watch any more, or do you?

(Testimony of Frank Duarte.)

A. We are supposed to watch.

Q. What for?

A. There might some lumps come down.

Q. From where? A. From the hopper.

Q. From the hopper? A. Yes.

Q. But not from the bucket?

A. And from the bucket, too. [30]

Q. How often have you seen that happen?

A. How long?

Q. How often? A. Pretty nearly all the time.

Q. That the coal falls out of a bucket after it has been dumped?

A. Well, sometimes, but not every time.

Cross-examination.

Mr. PEART.—Q. When a gang is changing, Mr. Duarte, they change clothes, don't they? They go down and change their clothes before they go to work?

A. Yes, they go down in the hold and change clothes.

Q. They always go down a little ahead of time to change their clothes?

A. They do most of the time that way.

Q. Then you had not taken charge of the gang yet?

A. No, not yet.

Q. Costa was still in charge? A. His own gang.

Q. Your crew was ready to go to work, or getting ready?

A. They were getting ready to go to work.

Q. You have been 15 years a stevedore?

A. Yes.

(Testimony of Frank Duarte.)

Redirect Examination.

Mr. BRADLEY.—Q. You say you watched this bucket as it went up, the one that spilled the coal on Souza? A. Yes.

Mr. PEART.—I object to that as not redirect examination.

The COURT.—Objection overruled.

Mr. BRADLEY.—Did any coal fall out of that bucket as it went up? A. No.

Testimony of J. Swartz, for Libelant.

J. SWARTZ, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. What is your business, what do you do for a living?

A. I am a longshoreman.

Q. Did you know Manuel Souza?

A. Yes, I knew him.

Q. Where were you working with Manuel Souza the day he was killed? A. Yes. [81]

Q. Where were you? A. I was up on the deck.

Q. What were you doing up on the deck?

A. I was watching for a chance to go down.

Q. Did you see this bucket that went up in the air?

A. I saw it going up.

Q. Did you see it when it got up to the top?

A. I don't know; I couldn't see it.

Q. You saw it after it got up to the top and before it went over to the hopper? A. No.

Q. You saw it go over into the hopper? A. No.

Q. I say, did you see it go over?

A. I saw it go over.

(Testimony of J. Swartz.)

Q. Then what happened?

A. Well, I don't know; that is none of my business.

Q. This bucket went in there? A. Yes.

Q. Did it stay in there, or did it come right back?

A. It came right back.

Q. It came right back?

A. I think so, because the coal fell down.

Q. What happened when the bucket came back right away. Was there any coal in this bucket when it came back? A. Surely there was coal.

Q. What did that coal do?

A. Well, the coal, it killed that man down there.

Q. It spilled down in the hold? A. Yes.

Cross-examination.

Mr. PEART.—Q. I think you said, Mr. Swartz, that you did not watch it because it was not your business? A. Yes.

Q. You did not watch the bucket go up?

A. I was watching myself. That is my business.

Q. You did not watch the bucket go over into the hopper? You just knew that some coal fell down; that is all? [82]

A. I just looked out for me; somebody hollered.

Q. Somebody hollered, and you saw some coal?

A. I run away.

Q. Then you ran away when somebody hollered?

A. Yes.

Q. You did not watch the bucket? A. No.

Q. Did the bucket go over into the hopper?

A. I suppose so.

(Testimony of J. Swartz.)

Q. That is what you suppose, because the coal came down? A. Yes.

Q. But you did not see it yourself?

A. No, I did not see it.

Testimony of Harold Nelson, for Libelant.

HAROLD NELSON, called for the libelant, sworn.

Mr. HEIDELBERG.—Q. For whom do you work at the present time—where do you live?

A. 605 Washington street, Oakland.

Q. For whom do you work?

A. Right now I ain't been working for ten months.

Q. You have not been working for ten months?

A. No.

Q. Haven't you been working the last ten months as watchman for the Western Fuel Company?

A. I was watchman at night.

Q. For the Western Fuel Company? A. Yes.

Q. You know the date that this man Souza was killed, do you not—you remember that accident?

A. Yes.

Q. And previous to that date, what had been your occupation? A. I was working upstairs with coal.

Q. For the Western Fuel Company?

A. For the Western Fuel Company.

Q. Of what did your duties consist?

A. Watching the trams.

Q. You had never, previous to the date of this accident, ever dumped any of this coal upstairs?

A. No.

(Testimony of Harold Nelson.)

Q. Who told you to go up there and dump coal on August 5th? A. Mr. Vincent.

Q. Mr. Vincent asked you as to whether you could do this work?

Mr. PEART.—I object to that. There is no charge here that [83] the Western Fuel Company was at all negligent in the selection of this man.

The COURT.—The objection is overruled.

Mr. HEIDELBERG.—Q. Did Mr. Vincent ask you whether or not you had ever dumped any of these buckets before?

A. No, he did not ask me.

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent and take an exception.

Mr. HEIDELBERG.—Q. Did he ever ask you if you could dump these buckets?

Mr. PEART.—Same objection.

A. Yes.

Mr. HEIDELBERG.—Q. Did he give you any instructions, or show you how to dump these buckets?

Mr. PEART.—Same objection.

A. No.

Cross-examination.

Mr. PEART.—Q. Mr. Nelson, will you just describe the process of dumping a bucket, to the Court.

Mr. HEIDELBERG.—I submit that is not cross-examination; if they want to make this man their witness they are perfectly at liberty to do it, and we will cross-examine him.

The COURT.—The objection is overruled. I would like to find out.

(Testimony of Harold Nelson.)

A. Well, you start in with the hopper, when the tub comes in—when the tub is in the hopper there is a clutch there that you handle, you open that and dump it out.

Mr. PEART.—All you have got to do is turn a clutch?

Q. When the tub is in proper position?

A. Yes.

Q. Was this tub over the hopper at the time you dumped it? A. Over the hopper, yes.

Q. I will show you this photograph, and I will ask you whether [84] that correctly shows the "Tancrid," and the hatch, and the bucket of coal coming up, and the hopper, and there you see the figure of a man. A. Yes.

Q. Is that a picture of yourself, Mr. Nelson?

A. No.

Q. Is that a man?

A. It don't look like me.

Q. The dumpman stands in that corner where this man is standing?

A. It is changed now to another corner. When I dumped the tub it was in that corner.

Q. It was in that corner when you dumped?

A. Yes.

Q. When the bucket swings in over the hopper, you dump that, do you? A. Yes.

Q. By pulling the clutch?

A. Yes, a big clutch that comes out like that.

Q. Did you dump the tub in any particular direction when you dumped it?

(Testimony of Harold Nelson.)

A. You dump it in that way (pointing).

Q. You were employed as a switchman before you went up and dumped the tub on this particular day?

A. Yes.

Q. A switchman in handling electric cars around the yard there, Mr. Nelson? A. Yes.

Q. What experience have you had as a mechanic?

A. I never had any experience.

Q. What other duties had you performed around cars or machinery besides switchman?

A. I had not done any other thing.

Q. Around the yard there you handled the cars, the tram cars for the Western Fuel Company with coal in them? A. No.

Q. What did you do? I thought you said that you handled the cars?

A. There are two men to each train; one is running the engine and the other is loading and switching.

Q. How wide is that hopper across this way, that is, running lengthwise with the ship?

A. Ten feet, I should say. [85]

Q. What kind of a handle is that under the bucket, or what kind of a clutch is it that you catch hold of to dump? A. It must be about that long.

Q. That is, 6 or 8 inches long? A. Yes.

Q. What do you do? Just move that to the right, or to the left? A. You pull it.

Q. That is all you have got to do?

A. That is all you have got to do.

Q. When you pull it the bucket opens and dumps.

A. It dumps.

(Testimony of Harold Nelson.)

Q. It dumps. Do buckets coming along that boom there come right in the same position every time, when they swing in? A. Yes.

Q. They always go right in the same place?

A. Yes.

Q. When they have reached the end of the line in toward the bunker, you pull the handle? A. Yes.

Redirect Examination.

Mr. HEIDELBERG.—Q. Mr. Nelson, you know the proper way to dump these buckets, do you?

A. Yes.

Q. Do you consider that you dumped this bucket properly? A. Yes.

Q. In your opinion and your experience, does coal fall out of the bucket, out of the hopper and out of the bucket as this coal did when the bucket is dumped properly? Did that ever happen after this time?

A. I could not tell you.

Q. Did it ever happen with you before this time?

A. No.

Q. In other words, in your opinion, did the engineer leave that bucket inside of the hopper long enough to be dumped? A. Yes.

Q. He did not pull it back too quick? A. No.

Q. Do you remember a conversation you had with me at the city and county of San Francisco hospital on or about September first, when you were there injured? A. I remember you were out there.

Q. Do you remember a conversation you had with me? A. No.

Q. Did you have a conversation with me?

(Testimony of Harold Nelson.)

A. I had a few words [86] with you, yes.

Q. About 15 or 20 minutes? A. Yes.

Q. Didn't you at that time state to me that the engineer—that you dumped the bucket properly, but that the engineer pulled the bucket back too quickly?

A. No.

Q. What caused this trouble, this bucket of coal dumping back?

A. When I pulled the clutch, the tub swung in a little on me, and a good part of the coal went outside of the hopper.

Mr. PEART.—Q. You dumped this bucket the same as you dumped all the rest of them? A. Yes.

Q. The bucket was in the same position?

A. Yes.

Q. And part of this coal fell out because the bucket swung around? A. Yes.

Q. How did that parteiular tub come in? Did it come in any different from any other tub?

A. No.

Q. Just the same?

A. The same thing as I had the whole forenoon.

Q. Did it take you any length of time to find out to perform your duties as a dumpman? A. No.

Q. Do you consider it hard work at all? A. No.

Q. Mr. Nelson, you have got to dump that bucket while the bucket is swinging in the air, haven't you, in order to give it a chance to dump? A. No.

Q. Well, I mean that the bucket has got to be free, suspended? A. It has got to hang free.

Q. When you dump it? A. Yes.

(Testimony of Harold Nelson.)

Q. Did you pull it any harder than you pulled any of the others? A. No.

Q. It just happened to have this swing at the time it did? A. Yes.

Q. So far as you could see, you had plenty of room for the coal to fall into the hopper? A. Yes. [87]

Mr. HEIDELBERG.—Q. How far in the hopper did the bucket have to go before it dumped?

A. To the middle of the hopper.

Q. How far is that, about?

A. About 7½ feet.

Q. I think it has been said by Mr. Peart that the hopper is 15 feet—is that about right, 15 feet?

A. No, it is not 15 feet.

Mr. HEIDELBERG.—Isn't that so, 15 feet, Mr. Peart?

Mr. PEART.—About 12 feet, the distance that way.

The COURT.—How big is the bucket?

A. I cannot tell you.

Mr. HEIDELBERG.—Q. Previous to the time you had gone up there, how many men were engaged in dumping buckets onto these hoppers?

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

A. I don't know.

Mr. HEIDELBERG.—Q. Did you make any protest of any kind against going up there? A. No.

The COURT.—What is the size of the bucket?

A. About 4 feet square.

(Testimony of Harold Nelson.)

Q. And it would swing in about 6 feet inside of the hopper? A. Yes.

Q. How do you account for spilling the coal out of the hopper?

A. Because it swung halfway around.

Q. In saying 6 feet inside the hopper, I suppose you mean by that the movement of the bucket was 6 feet in. It would have to swing pretty well around in order to dump the coal outside of the hopper, wouldn't it?

A. When a tub dumps that throws the coal.

Q. Throws it over the side of the hopper?

A. In front of the hopper. [88]

Q. In throwing the coal over the side of the hopper, would it throw it down into the hatch?

A. Yes.

Q. Was this coal thrown over the side of the hopper? A. Yes.

Q. How far above the top of the hopper was this trolley that it works on? A. 10 or 12 feet.

Q. That is the place where you dumped?

A. Yes.

Q. The bucket when dumping, then, is 12 feet above the hopper?

A. 12 feet from the trolley, where the boom is.

Q. How far above the hopper is the bucket when it is dumped? A. About two feet.

Q. Two feet? A. Yes.

Q. You mean the bottom of the bucket, or the top of the bucket? A. The bottom.

Q. The top would be what?

(Testimony of Harold Nelson.)

A. The top turns and dumps it.

Mr. PEART.—Q. Mr. Nelson, when you dumped this particular bucket that killed Souza, were you standing where that man is there in this picture?

A. I was standing in that corner there; I don't know whether it is the same tower or not; it may be another tower. I was standing there.

Q. Right where that man is? A. Yes.

Q. This boom which has a carrier up here to carry the rope from which the bucket is suspended is about 12 feet above the top of the hopper?

A. Yes, about 12 feet.

Q. And the bucket swings by a steel cable over the hopper? A. Yes.

Q. With the bottom of the bucket about 2 feet above the lip of the hopper, or above the plank that you are standing on?

A. The plank that I was standing on.

Q. When you pulled the clutch on this bucket, you were standing in at the back part of the hopper, where it joins the bunker? A. Yes.

Q. Of course, the bucket is swinging on 12 feet of cable, because [89] it is hoisted by a cable, is it not? A. Yes.

Q. About 12 feet of cable?

A. Yes, or about 10 feet.

Q. About 10 feet, anyhow? A. Yes.

Q. And the coal, by reason of the bucket swinging around, went over the side of the hopper?

A. It came over this way and I pulled it back and then it came out and dumped sidewise.

(Testimony of Harold Nelson.)

Q. But you pulled the clutch the same as you pulled any other clutch that morning? A. Yes.

Q. The bucket came in just the same way?

A. Yes.

Mr. HEIDELBERG.—Q. How wide did you say that hopper was? A. 10 or 12 feet.

Q. How close was this to the back edge of the hopper, where that man is standing?

A. He is standing right in the middle, on one side.

Q. Does this cable go over further this way?

A. Yes.

Q. It goes over all the way? A. Yes.

Q. In order for you to dump it, it has to come in at least five or six feet inside before you can dump?

A. About 5 feet.

Q. Where you stand, you say it is only 2 feet above the hopper. And the bucket is about 4 feet wide, you say?

A. About 4 feet; I never measured it.

Q. Then you want us to understand if you dumped this bucket 6 feet inside that it could dump coal away back over here by the force of it swinging?

A. It was dumped properly, but it swung sidewise.

The COURT.—We will take our recess now until two o'clock.

(A recess was taken until two P. M.) **[90]**

AFTERNOON SESSION.

Testimony of Mary F. Souza, for Libelant.

MARY F. SOUZA, called for the libelant, sworn.

Mr. BRADLEY.—Q. Mrs. Souza, where do you live? A. 1070 Third street, Oakland.

Q. How long have you lived there?

A. Four months.

Q. Are you the widow of Manuel Souza, who lost his life August 5, 1916? A. Yes.

Q. When were you married?

A. I was married in June—I forget the date.

Q. Do you remember the year?

A. It was in June.

Q. Do you remember the year? A. No.

Q. When was it with reference to the fire—the same year?

A. Yes, the time of the earthquake was in Oakland. I married in June.

Mr. PEART.—We will stipulate, Mr. Bradley, that the parties were married in 1906.

Mr. BRADLEY.—The certificate is May 25, 1906, your Honor, and I will offer it.

Q. How many children has been born of your marriage? A. Eight children.

Q. How many are alive? A. Five.

Q. How many were living when Manuel Souza lost his life? A. Four.

Q. One has been born since that time?

A. Yes, five months after my husband was killed.

Q. Five months after your husband was killed?

(Testimony of Mary F. Souza.)

A. Yes.

Q. What are the ages of those five children, their names and ages; start with the oldest one?

A. The oldest was three months when she died.

Q. The ones that were alive when he died. Now, the oldest one, what was her name? A. Eva.

[91]

A. Eva was 9 years old on Christmas Eve.

Q. Last Christmas Eve? A. Yes.

Q. What is the name of the next one?

A. Willie.

Q. How old is Willie?

A. Willie is 6 years; he will be 7 in June coming.

Q. And the next one? A. Alma.

Q. How old is Alma? A. Alma is 5 years.

Q. And the next one? A. Mabel.

Q. How old is the little child?

A. Four years in January.

Q. And the next one?

A. The baby is 13 months.

Q. That is the little one that was born after Manuel lost his life? A. Yes.

Q. What is the name of him? A. Manuel.

Q. Do these children go to school?

A. Three go to school, Eva, William and Alma.

Q. They are all in court, are they?

A. Mabel is in the hospital, sick.

Q. That is the next to the youngest one?

A. Yes, Mabel.

Q. She is in the hospital? A. Yes.

Q. What were the habits of Manuel Souza with

(Testimony of Mary F. Souza.)

reference to taking care of his family? Did he take good care of his family?

A. Yes, he was a nice fellow.

Q. Did he provide for the children fully, all your needs? A. Yes.

Q. How have you provided for the children since his death? A. I don't know what you mean.

Q. How have your taken care of the children, supported them, since he died?

Mr. PEART.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—The objection will be sustained. I don't think it throws any light on the pending proceeding. [92]

Mr. BRADLEY.—Q. You don't know, do you, how much money he earned each week? A. No.

Q. Did he work most of the time? A. Yes.

Q. How much of the time did he work?

A. I could not say.

Q. Regularly, or off and on? A. Regularly.

Q. Regularly? A. Yes.

Q. Did he or not frequently work Sundays and nights?

A. Well, he used to work Sundays and nights, not every time, but once in a while.

Q. But he was constantly employed? A. Yes.

Q. Right along? A. Yes.

Q. Have you any other means of support than what you got from him to take care of yourself and children?

(Testimony of Mary F. Souza.)

Mr. PEART.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—The objection is sustained.

Mr. BRADLEY.—Q. What was the age of your husband when he died? A. 36.

Q. How old are you? A. I will be 30 in June.

Cross-examination.

Mr. PEART.—Q. Mrs. Souza, your husband worked in coal most of the time?

A. Coal and cement and lumber.

Q. Weren't there times when there was not any work, when there were no ships?

A. Well, when there was coal he used to work in coal; when he didn't have no coal he used to go out and work.

Q. What pay would he get for that, the same as stevedore?

A. I don't know how much he would get.

Q. When he was doing the other work you don't know how much he got? A. No.

Q. You said that he worked right along. Out of a whole year, about how many months do you think he worked? [93]

A. I could not tell how many months he worked in the year.

Q. Do you think that he worked more than two-thirds of the time in working days?

A. I think he worked more.

Q. Mrs. Souza, when this matter was down at the Industrial Accident Commission, the company paid you every week for a while, didn't it? A. Yes.

(Testimony of Mary F. Souza.)

Q. It paid you $11.25 a week, didn't it? A. Yes.

Q. Altogether the records show, I think, $494. Do you think that is about right?

A. I could not tell you, because I did not mark it down.

Q. Did they pay you $11.25 a week from about the time your husband died? A. Yes.

Q. Up to about June, 1917; you remember that?

A. Well, the last check they sent to me was June 9.

Q. 1917? A. Yes.

Mr. PEART.—May it be stipulated that under a mistaken view in connection with this, Mrs. Souza was paid a total of $494.

Mr. BRADLEY.—I don't know the amount. You can prove that.

Mr. HEIDELBERG.—We will stipulate she was paid, but certainly not under a mistaken view,—if your records show the amount that was paid, we will stipulate to it.

Mr. PEART.—That is the record I have, the original vouchers here, that she was paid $494.

Redirect Examination.

Mr. BRADLEY.—Q. Mrs. Souza, there was a question or a contest about how much the earnings were of your husband in the proceedings before the Industrial Accident Commission, was there not? There was a difference about it?

A. There was a difference. [94]

Q. That is, you did not agree on the amount that was earned?

(Testimony of Mary F. Souza.)

Mr. PEART.—We will stipulate to that, if your Honor please.

Mr. HEIDELBERG.—At this time I would like to read into evidence the mortality tables, to show the expectancy of life of this man. I think if the certificate is right, it will be found that Manuel Souza in 1906 was 26 years of age, when he was married. This accident happened 10 years later, and of course he was 36 years old at that time. I think that is the clearest and best proof we can get. The other might be hearsay. I will read into evidence the Carlisle table, which shows man has an expectancy of life of 30.32 years; the American experience tables, of 31.07 years; 30 companies' experience of 31.43 years. Will that be stipulated, that that may go in evidence as read?

Mr. PEART.—Yes.

Mr. HEIDELBERG.—That is the libelant's case. **[95]**

Testimony of George Hayes, for Respondent.

GEORGE HAYES, called for the respondent.

Mr. PEART.—Q. Mr. Hayes, where do you reside? A. 3129 Dover Street, Oakland.

Q. What is your business?

A. Hoisting engineer.

Q. How long have you been a hoisting engineer?

A. 16 or 17 years.

Q. Were you employed by the Western Fuel Company in August, 1916, at the time that Souza was killed? A. Yes.

(Testimony of George Hayes.)

Q. Were you in the same position, Mr. Hayes, engineer on that day? A. Yes.

Q. Now, I call your attention to these photographs which have been introduced in evidence and ask you to clear up, if possible, any discrepancies or ambiguities in the testimony already given. These buckets are hoisted by the electric power?

A. Yes, they are.

Q. And that electric power is controlled by yourself as hoisting engineer? A. Yes.

Q. Where are you stationed when handling that electric power?

A. Just to the right of where this man was standing, in the tower.

Q. Up in the bunkers? A. In the tower.

Q. Up in the tower; it is called a tower, is it?

A. Yes.

Q. About how high is the hopper above the deck of the "Tancrid" as she lays there by the bunkers?

A. I should judge around 70 or 80 feet.

Q. 70 or 80 feet? A. Yes.

Q. This bucket is hauled up by a steel cable?

A. Yes.

Q. And when the bucket is pulled up to the arm, the boom which stretches out there, directly over the hatch, have you also [96] machinery which throws the bucket in towards the hopper as it raises; or does it move in towards the hopper after it has reached the proper height?

A. You can bring it in at any time.

Q. At any time you please? A. Yes.

(Testimony of George Hayes.)

Q. When the bucket is up at a sufficient height what do you do in order to bring the bucket over towards the hopper?

A. Release the automatic brake on the machinery and it comes in of itself.

The COURT.—Q. Does it come in by gravity? How does it swing in?

A. The top of the tower is probably 40 feet above this boom; the cable runs up from the tram to the top of the tower, and when you release the automatic brake the weight of the bucket brings this in of itself.

The COURT.—Q. By gravity? A. Yes.

Mr. PEART.—Q. When do you know when to start your machinery to hoist the bucket?

A. The whistle from the hatch-tender is the signal.

Q. A signal from the hatch-tender? A. Yes.

Q. Then you begin to lift the bucket? A. Yes.

Q. Then when it has reached the proper height you release the brake and the bucket swings over by gravity or rolls over on that arm until the bucket goes over the hopper? A. Yes.

Q. Do you always swing the buckets in the same distance? A. Yes.

Q. Have you an automatic stop on that, or how do you govern that?

A. It can only come in so far.

Q. It moves down so far? A. Yes.

Q. You have no control over that; when you release that automatic brake that brings it in the same distance each time? A. Yes. [97]

Q. How long have you been hoisting buckets of this

(Testimony of George Hayes.)

character with coal there at the Western Fuel Company's dock? A. About a month.

Q. About a month? A. Yes.

Q. You say you had been acting there as hoisting engineer for a number of years? A. Yes.

Q. Handling similar apparatus?

A. Well, derricks, structural steel, work of that kind, hoisting apparatus.

Q. All kinds of hoisting apparatus?

A. Yes.

Q. Do you recall the hoisting of the particular bucket, a part of the contents of which fell back into the hold? A. Yes.

Q. How did you proceed in the hoisting of that bucket?

A. Just the same as the usual procedure, just turned the electric current on, and when the bucket was up sufficiently high to clear the edge of the hopper I released the brake, it came in the same as the rest of the buckets.

Q. By the way, how far above the edge of the hopper is the bottom of the bucket as it swings in there?

A. Usually a couple of feet.

Q. What length of steel cable is used there between the bucket and the boom?

A. Around 10 to 12 feet—8 to 12 feet.

Q. Are you familiar with the tipping apparatus by which the bucket is dumped? A. Yes.

Q. You heard Mr. Nelson's testimony here this morning. Is that the fact that the dumpman simply pulls the clutch which tips the bucket over and dis-

(Testimony of George Hayes.)

charges the contents? A. Yes.

Q. Does the bucket tipper or dumpman stand in the position indicated in that photograph? You see a man right in there?

A. Sometimes they stand on that side and sometimes they used to stand on this side, in the same relative position from the hopper. [98]

Q. Either on one side of the hopper or the other?

A. Yes.

Q. And at the same distance from the lip of the hopper? A. Yes.

Q. Back towards the bunkers? A. Yes.

Q. It is in that position that the dumpman reaches for the clutch to dump the bucket? A. Yes.

Q. Now, what time of the day was it that this particular bucket was raised?

A. Just before 12 o'clock.

Q. Just before 12 o'clock? A. Yes.

Q. How do you fix that particular time in your memory?

A. That was the last tub I was going to hoist before I went off shift at noon.

Q. Had you known Mr. Souza for any length of time? A. No.

Q. You had not known him? A. No.

Q. Is it possible for you to hoist one bucket faster than another bucket?

A. It is possible to, but you know the electric motor will only run so fast; you can go slower than that if you like, but it is a steady speed at which the motor runs. That is the usual way it always runs.

Q. Did you hoist this bucket at the same rate of

(Testimony of George Hayes.)

speed that you hoisted all of the buckets that morning? A. Yes.

Q. How do you know when to drop *the* back the bucket, Mr. Hayes, or send it back on the boom?

A. You can plainly hear the coal falling into the hopper and then when it latches back you can see through the window.

Q. You have a window by which you observe that, have you? A. Yes.

Q. When you see that the coal has dumped then you apply the machinery or apply the power to it to pull it back? A. Yes.

Q. And drop it, then, down below?

A. Yes. [99]

Q. Do you receive a signal before dropping it?

A. No.

Q. You drop it without signal? A. Yes.

Q. Did you observe this particular bucket dumped?

A. I was watching it the same as I did all of them.

Q. How was this bucket dumped?

A. I could not see any difference from any of the rest of them, any of the other procedure; there was a little swing in the bucket as it came in, as there is to nearly every one.

Q. They have always a little swing one way or the other? A. Yes.

Q. With that length of cable holding them to the boom? A. Yes.

Q. But so far as you observed there was no difference in the dumping of this bucket than any other bucket? A. No.

(Testimony of George Hayes.)

Q. And you were looking, were you, at this bucket at the time? A. Yes.

Q. I wish you would explain to the Court how it was you could see that bucket. Could you show that from that big photograph?

A. The little one I think shows just as plainly.

Q. You were inside back of this window here?

A. Yes.

Q Which appears in the photograph as you look at it to the left of the man standing on the hopper?

A. Yes.

Q. Had you applied the power to that bucket to pull it back before it had fully dumped. A. No.

Q. Was the bucket fully dumped before you put the power on it to pull it back? A. Yes.

Q. After Sousa was injured did you pull him up in the same bucket? Did you drop the bucket into the hold and haul him up out of the hold with it?

A. The hatch-tender called for the bucket and I let it down and they brought him out of the hold in it, the same bucket.

Q. Now, in regard to the function of the man who dumps the [100] bucket; I think I have asked you this question; I don't want to repeat it if I can help it, but did I ask you whether or not it consists of anything except of pulling that clutch?

A. That is all.

Q. That is all he would have to do? A.

Cross-examination.

Mr. BRADLEY.—Q. Mr. Hayes, how long have you been working as hoisting engineer in unloading

(Testimony of George Hayes.)

ships with this bunker apparatus? What has been your experience as to time?

A. I went to work shortly after the 4th of July, the month previous.

Q. The month previous; that is the only work you entered upon on a coal bunker in unloading ships?

A. Yes.

Q. With this particular set of apparatus or apparatus of this kind? A. Yes.

Q. Now, the man who got killed had nothing to do with the operation of this machine, did he?

A. No.

Q. You had full control of the operation of the machine, did you?

Mr. PEART.—I object to that as calling for the opinion of the witness. He has testified that he handled the bucket according to the signal given.

Mr. BRADLEY.—My notes show that he said that he had personal control, and I want to get at the bottom of the matter.

The COURT.—I should think he would have had control even though he was obeying signals.

Mr. BRADLEY.—Q. There was a signal for hoisting the buckets out of the hold. That is true, is it not? A. Yes.

Q. And you worked on those signals? A. I did.

Q. Now, after the bucket was hoisted through the power which is [101] controlled by you, then you say when it got to the boom which carried it into the the bunker it came by gravity on a release of the clutch; you were standing at a window where you

(Testimony of George Hayes.)

could see the dump-tender and the bucket?

A. I could see the bucket.

Q. You don't know then what the dump-tender did in this case? A. He was on the opposite side.

Q. You don't know what he did on this occasion.

A. No.

Q. You saw this particular bucket, didn't you?

A. I did.

Q. You say that the bucket was fully dumped when you put the power on to pull it back. Now, as a matter of fact, the bucket never was fully dumped—isn't that true—except as it spilled into the hold?

A. There was no more coal left in it.

Q. When it started back?

A. No; I went down for the man.

Q. Do you mean to tell the Court when that bucket left the hopper and went out on that boom that it did not have any coal left in it?

A. I mean to say that I did not give it any power to go back there until I got a signal to go down after the injured man.

Q. You did not get a signal to send the bucket back? A. That was the last tub I was to take.

Q. You were going off shift? A. Yes.

Q. Assuming that there had been no accident before you went off shift would you have sent the bucket back? A. No.

Q. You would not? A. No.

Q. Then you did not try to send it back, did you?

A. No.

Q. How did it go back without power?

(Testimony of George Hayes.)

A. It did not go back.

Q. It takes power to send it out on that arm after it is dumped? A. It does.

Q. Was the power put on by you at all before you got knowledge [102] that the man was injured and killed? A. No.

Q. How did the bucket get out of the hopper?

A. It didn't get out of the hopper.

Q. Didn't it go back out on the arm and spill coal into the hold? A. No.

Q. Are you sure of that?

A. I know I did not give it any power to go out there.

Q. That is not the question. Did the bucket leave the hopper at all? A. No.

Q. It didn't? A. No.

Q. Then it stayed in the hopper and was fully dumped into the hopper; is that right?

A. It was fully dumped as far as it was in the hopper.

Q. Then what happened after that? After it was fully dumped in the hopper every bit of the coal was out of that bucket, what happened?

A. There was a little swing to the bucket and a few lumps hit the edge of the hopper I guess.

Q. Just a few small lumps?

A. I did not count them; there were several lumps.

Q. Little ones or big ones? A. Average size.

Q. Where did they go?

A. Part of them went in the hold and part on the back of the shed.

(Testimony of George Hayes.)

Q. But they fell out of the hopper, not out of the bucket; is that right? If the bucket was fully dumped they fell out of the hopper, and not out of the bucket; is that right?

A. Yes, they fell out of the hopper; they went out of the top.

Q. In other words, the bucket was subsequently dumped? A. As far as I know.

Q. You didn't take any action with reference to the operation [103] of the machinery to send the bucket back to the hold until you learned that there was an accident; is that right? A. I did not.

Q. Did the bucket make any motion to go back onto the arm, to go into the hold, before you got knowledge of the accident? A. No.

Q. It stayed right in the hopper? A. Yes.

Q. Was it clear in the hopper? A. Yes.

Q. It was clear of the edge of the hopper?

A. Yes.

Q. How far in?

A. I should judge around 5 or 6 feet.

Q. Then there could not have been any coal that fell out of the bucket into the hold, could there?

Mr. PEART.—I object to that as argumentative. He has described how it happened two or three times.

The COURT.—It is argumentative.

Mr. BRADLEY.—Q. At any rate you testified, did you not, that there was not any coal that fell out of the bucket into the hold?

A. It did not fall out of the bucket into the hold.

Q. None?

(Testimony of George Hayes.)

A. None out of that particular bucket at that time.

Q. You testified that there was no difference in the dumping of this bucket from any other bucket. You base that on the proposition that this bucket was fully dumped inside of the bunker? A. Yes.

Q. What happened on this occasion that was different from what usually happened, that is, according to your observation of what happened?

A. Outside of a few lumps going down.

Q. Do you operate the power machinery in your charge without any reference whatever to what the dumpman says, or do you? In the slipping of the clutch do you have any regard for that at all in doing your work? Do you take any notice of that?

A. I don't quite get you.

Q. You can't see the dumpman from where you were; you don't [104] know whether he has properly dumped it or not? A. I can see the bucket.

Q. Then can you tell? A. Certainly.

Q. Do you usually go by sight or by ear when a bucket is dumped. Which is the usual way?

A. Eyesight.

Q. And you saw this bucket? A. I did.

Q. On this occasion? A. Yes.

Q. Could you see in it? A. No.

Q. What could you see from that window in the tower?

A. I could see the bucket as it came in over the hopper.

Q. Anything else? A. That is all.

Q. Could you see the coal in it? A. No.

(Testimony of George Hayes.)

Q. How do you know all the coal was dumped out of it and it was empty?

A. Any time anything turns upside down it is very seldom anything is left in it.

Q. It does turn clear upside down? A. Yes.

Q. You can't see the coal coming out of it, can you?

A. Yes.

Q. Can you see the coal in it before it comes out?

A. No.

Q. Can you see whether all the coal came out?

A. I couldn't say that every lump came out positively; I didn't see it all.

Q. You say there was a considerable swing to the bucket? A. There was some swing to it.

Q. Was it swinging after it turned upside down?

A. Every bucket does.

Q. Was it swinging after it turned upside down?

A. Yes.

Q. How much of a swing?

A. That varies on the kind of coal that is in the bucket; the action of the coal falling out of the tub affects the swing.

Q. On this occasion how much was the bucket swinging after it turned clear over?

A. Probably four feet.

Q. Would that swing have any effect or tendency to keep the coal on the bucket? **[105]**

Mr. PEART.—I submit that is not a fair question because he is asking the witness about the swing of the bucket after the coal dumped.

The COURT.—The objection is overruled.

(Testimony of George Hayes.)

A. Would the swing have any effect?

Mr. BRADLEY—Q. Yes; does the bucket turn clear upside down, face down, or does it turn on an angle and spill the coal? You can tell me?

A. It turns very near upside down.

Q. It has a clearance of about two feet, to turn clear over?

A. If it is two feet from this rod that comes in it is six feet from the bottom of this.

Q. Then from the bottom of the bucket to the coal in the hopper on this occasion was how far?

A. I would say six feet.

Q. You are certain you did not send the bucket back? A. I am.

Q. How far to the right of the bucket is the tower where you are stationed? How much higher are you than the place where the bucket?

A. I am lower than the bucket.

Q. How much lower? A. Probably four feet.

Q. How far to the right? A. About 8 feet.

Q. Four feet lower and eight feet to the right.

A. Yes.

Q. As you look up and the bucket comes in you can see what happens with reference to dumping, whether the coal is all out, or not? A. Yes.

Q. You are certain that this bucket was completely dumped and that it did not go back out on the boom spilling coal as it went? A. I am.

Q. Can you state positively where the coal came from that went down into the hold? A. No.

Q. You don't know? A. No.

(Testimony of George Hayes.)

Q. Did you see any coal falling out at all?

A. I did.

Q. What caused the fall. [106]

Mr. PEART.—I submit the question has been asked and answered.

The COURT.—What caused it to fall?

Mr. PEART.—He said that the bucket swung slightly.

The COURT.—Four feet he said. Is that a slight swing?

A. That is afterwards—after it was dumped.

Q. What caused the coal to miss the hopper and go down into the hold? A. I could not say.

Mr. BRADLEY.—He says it did not miss the hopper, but that the bucket was completely dumped, and I want to know where the coal came from that went into the hold that he says he saw, several lumps. Where did that coal come from?

The COURT.—Q. You saw the coal falling, didn't you? A. Yes.

Q. Some went into the hold and some went on to the deck? A. Yes.

Q. Where did it fall from?

A. It was originally in this tub that came up; I don't know whether it was from the front of the hopper or the side of the hopper; I couldn't say.

Q. Was the hopper so full that it would not hold any more? A. No.

Q. The hopper goes in like this? A. Yes.

Q. If the coal once slipped inside of that it could hardly rebound and fall over, could it? A. No.

(Testimony of George Hayes.)

Q. Now, from your observation, as you saw it, just what caused that coal to fall—that coal which should have run down into the hopper, what caused it to go down into the hold, or to go on to the deck?

A. A few lumps must have struck this 12 by 12 timber on the edge of this hopper, and some lumps must have fallen on this timber and rolled overboard and went down below. [106½]

Q. Why should they fall on the timber?

A. I could not say.

Q. Would they fall on that timber when the bucket is properly dumped? A. It does quite often.

Q. There must be some defect in the machinery then? A. No.

Q. How wide is the hopper?

A. About 8 feet, I think.

Q. Eight feet clear?

A. No; it is tappered; it is about 8 by 12.

Q. 12 feet long and 8 feet wide?

A. Something like that.

Q. Do you mean to say that the bucket could not dump into a hopper of that size without spilling coal over the edges? A. I had nothing to do with the dumping.

Q. I am not asking you whether you had anything to do with the dumping. You say that it might have fallen on the edges, and I asked you whether the machinery was out of order and you said no, and I asked you if it was due to improper dumping and you said no. I want to know why in a hopper 12 feet long by 8 feet wide a 4 foot bucket cannot be

(Testimony of George Hayes.)

dumped without spilling the coal over the edge of the hopper?

A. In these tubs, the lumps kind of pound themselves together in there, sometimes and as it dumps over they fall out at the same time, and it makes the top swing a little.

Q. We will concede the bucket is pretty well loaded. Is there swing enough to swing it over the edge of the hopper?

A. No. It is just by the action of the coal going out of the bucket.

Q. It is always swinging? A. Yes.

Q. It always swings with the bucket loaded the same?

A. They are not all loaded the same; some have lump coal and some have small stuff; no two will dump exactly the same. [107]

Q. Do you think a larger hopper would answer for that problem? A. No, I don't think so.

Q. You don't think a hopper could be made large enough to prevent coal from tipping over the side?

A. Oh, it could be done.

Q. What I am trying to get at is how much liability there is any time for a similar accident to occur to the one that occurred that day. Is it liable to happen whenever a bucket of coal is dumped?

A. It has not happened since.

Q. Did it happen before?

A. No, not to my knowledge.

Q. Then this is a unique case, a unique occurrence, a single occurrence in all your experience.

(Testimony of George Hayes.)

Mr. BRADLEY.—Q. The lip of the hopper, does it stand up or does it run horizontal? That is the edge of the hopper, where the bucket comes in, is it tipped up, is it tipped back like that or is it level?

A. You can see from the plan in the picture it slopes in.

Q. Now, as you looked out there did you see any coal on the lip or the edge of the hopper, or would it go that way if there was anything up here?

A. Yes.

Q. Was there anything that knocked any coal out of there on to edge?

A. I couldn't see anything knocked out.

Q. How did that coal get out of there that you saw come out? A. I could not say.

Q. There was not anything hit it that you saw and you were looking at it? A. Not that I know of.

Redirect Examination.

Mr. PEART.—Q. Mr. Hayes, am I correct in saying that it is not uncommon for coal to fall out of the hopper?

A. No; lumps fall most any time; it is no uncommon thing. [108]

Q. In other words, in answer his Honor a few moments ago, you would have us understand that there was never that amount of coal spilled before or after that you know of?

A. I meant there has been no accident similar to that, not that same amount or anyone killed.

Q. Either in the same amount of coal falling or in one getting killed?

(Testimony of George Hayes.)

A. Yes. I guess there has been the same amount at different times but nobody has been hurt.

Q. Some coal does from time to time drop out of the hopper, does it not? A. Yes.

Q. Did I understand you correctly in saying that in the act of dumping the coal out of the bucket a certain class of coal gives it each time about the same amount kick? A. Yes.

Q. Have you ever seen coal drop out of the hopper before while the bucket was being dropped?

A. Yes, quite often.

Q. Have you been working since as winchman over there at the Western Fuel Company? A. Yes.

Q. Now, since this accident in August, 1916, have you on more than one occasion seen coal drop out of the hopper as the bucket was being dumped?

A. Yes, occasionally.

Q. Occasionally it happens? A. Yes.

Q. Have you noticed anything unusual in the act of the dumpman in dumping these buckets where the coal has dropped over? A. No.

The COURT.—Q. The coal dumpman stands practically in the same position, does he, all the time?

A. Yes.

Q. And the dumpman, the bucket, must come within his reach? A. Yes.

Q. And that brings the tub within the lip of the hopper?

A. Yes, I should judge around six feet. [109]

Q. Does the tub right itself automatically?

(Testimony of George Hayes.)

A. Yes.

Q. As soon as it comes out and come back you can hear the click or catch after it goes? A. Yes.

Q. Sometimes you go by that in sending it back?

A. No, we always watch it.

Q. Did this coal spill over the sides of hopper?

A. I could not say whether it spilled over the sides or which side it was.

Q. Or the front?

A. I don't think it went over the front.

Q. There was some kick sidewise then that spilled that over the side? A. I believe so.

Q. Not the back kick from the dumping of the coal?

A. I could not say just what it was. There is always a little swing to the bucket as it comes in. If it dumps there is no swing.

Q. Of course the swing from the bucket as it comes in may be either fore and aft or lateral?

A. Yes.

Q. Do you recall which way it was that day?

A. I could not state, no.

Q. The swing that comes from the kick of the coal when it is dumped, which way is that, does it go sidewise or backwards?

A. Well, if you bring a weight on the end of any strand of a cable or wire rope, the weight on there has a tendency to unwind this cable, and the bucket always has a little circular motion; which way the tub was faced when the load was dropped I could not say; I did not pay any particular attention to that.

(Testimony of George Hayes.)

Q. If the tub was properly dumped, it should face inward?

A. The latches on tub are on one side and on some on the other.

Q. But with a proper dumping of the tub it would require the tub to dump inward toward the hopper and not outward toward the end of the hopper?

A. I would not say which was the proper [110] way.

Q. There would be less danger of coal falling over the edge of the hopper if it was dumped inward, toward the center of the hopper, than if it was dumped outward toward the outer edge of the hopper? A. I don't think so.

Q. I don't know. I may be mistaken. It seems to me that the proper way would be to dump in and not in, towards the bunker and not out towards the ship; so far in that there would not be any danger of throwing the coal back into the hold, if you have 12 feet one way and 8 feet the other—the hopper is that large, isn't it?

A. The hopper is that large, but the 12 feet is running back in here; not 12 feet over here.

Q. I mean it is 12 feet that way and 8 feet the other?

A. But the bucket hangs in here so that it is 4 or 6 feet inside of the hopper.

Q. Now, if it is 4 feet inside, that would leave you eight feet still further in, wouldn't it, in the hopper?

A. That is four feet from the outer edge of the hopper.

(Testimony of George Hayes.)

Q. You mean the outer edge of the tub is four feet from the outer edge of the hopper? A. Yes.

Q. That is when it reaches the place to be dumped?

A. Yes—around 6 feet.

Q. Now, you have 12 feet altogether lengthwise and 8 feet sidewise, haven't you?

A. I think that is the size of it. I would not say.

Q. There would be less danger of coal going over the edge of the hopper if it was dumped lengthwise of the hopper, wouldn't there, than if it was dumped the other way? You see it would have a great space to fall in, without hitting the edge of the hopper or going over the hopper, wouldn't it?

A. I *should* [111] *so;* I think so.

Q. Do you know whether this coal fell over the edge of the hopper of either side or whether it fell over the front of the hopper? If it fell over the back of the hopper would it reach the deck? A. No.

Q. It must have fallen over on one side or the other, or in front? A. Yes.

Q. Either it must have fallen on the side that it came in on, or on the right or left-hand side?

A. Yes.

Q. You say you regularly dumped coal without any falling over, although occasionally it does fall over? A. Yes.

Q. And the bucket swings as a circular swing?

A. Yes.

Q. It gets a kick when it is dumped? A. Yes.

Q. Which way does the kick generally come, toward the back of the bucket?

(Testimony of George Hayes.)

A. Yes, if the bucket dumps this way the kick will come this way.

Q. So that if the back of the bucket is toward the side of the hopper it is liable to come that way?

A. Yes.

Q. I still think, then, that the safer way to dump the coal should be when the bucket is facing lengthwise of the hopper, wouldn't you?

A. I suppose it would.

Q. You have got four extra feet to catch your coal that you have not got on the side? A. Yes.

Mr. BRADLEY.—Q. Did you see all the coal that fell out? I understood you to say that you saw all the coal that fell into the hold?

A. No, I did not say that.

Q. You saw some fall?

A. It all happened so quick—

Q. You saw some fall? A. Yes.

Q. They were small lumps and just a few of them, or were there many lumps, and a lot of coal that went over the edge of the [112] hopper?

A. There were only a few lumps.

Q. How big were they and how many? I do not want you to be exact.

A. They were all the way from as big as your fist to 100 pounds.

Q. As big as your fist to 100 pounds? A. Yes.

Q. A considerable number of lumps fell that weigh 100 pounds?

A. No, I would not say that any fell of 100 pounds. The coal that was in the tub was that weight.

Q. I mean the ones that you saw fall, how big were

(Testimony of George Hayes.)

they? Of course, you don't have to tell us if you don't know. Can't you indicate whether they were large or small?

A. They were, I should judge, as big as your fist or as big as your two fists.

Q. Was there a great quantity that went over the edge, or just a few lumps?

A. Just a few lumps.

Q. About as big as your fist? A. Yes.

Testimony of Harold Nelson, for Respondent (Recalled).

HAROLD NELSON, recalled for the respondent.

Mr. PEART.—Q. Mr. Nelson, have you ever had any experience as a stevedore rigger?

A. As a rigger, yes.

Q. You have been accustomed to working on the rigging up in the yards of ships? A. Yes.

Q. For how many years before August, 1916?

A. About 10 years, I guess.

Q. When this bucket comes in there on the hopper or to the hopper does it have some swing to it as Mr. Hayes described?

A. It swings, more or less, all of them.

Q. It swings more or less? A. Yes.

Q. As I recall your testimony I think you went into the rest [113] of the details of the matter. Was this bucket swinging more than usual as it came in? A. No.

Q. When you pull that handle does the entire bucket dump immediately or does it come out dropping slowly?

(Testimony of Harold Nelson.)

A. Sometimes it drops slowly and other times fast.

Q. Other times fast? A. Yes.

Q. When it comes out slow is it because the coal is wedged in the bucket?

A. I don't *know was* the cause of it.

Cross-examination.

Mr. BRADLEY.—Q. How did the coal come out of the bucket this time, slow or fast?

A. Slow.

Q. Did the bucket come out of the hopper immediately after the coal had come out of it slowly?

A. Mr. Hayes lowered the bucket down to hoist that man up.

Q. Did the bucket come out immediately after it was dumped before you knew there was an accident?

A. It went out.

Q. When the bucket came out did it have anything in it? A. No.

Q. You could see it dump? A. Yes.

Q. Did you see any coal fall?

A. I seen the coal fall over the side.

Q. Where did the coal come from that fell down the edge of the hold?

A. It came when the bucket dumped.

Q. It came from the bucket? A. Yes.

Q. Then the bucket was dumped outside of the hopper, was it not?

A. When the bucket swung—

Q. The bucket came out of the hopper and part of it was dumped outside?

A. Some of it was dumped outside. When I

(Testimony of Harold Nelson.)

pulled the latch the bucket swung broadside and dumped that way.

Q. How far into the hopper had the bucket gone?

A. Four feet. **[114]**

Q. How far was it swinging?

A. Maybe a foot.

Q. About a foot? A. Yes.

Q. It did not ever swing outside of the mouth of the hopper, did it?

A. The bucket did not swing out.

Q. How could the coal fall outside of the hopper?

A. From the force of the lumps as they come out of the bucket.

Q. The coal that went down into the hold fell out of the bucket, didn't it?

A. It fell out of the bucket, yes.

Q. Did you see it fall? A. Yes.

Q. You didn't give any warning?

A. I had no time.

Q. But the bucket did not move on the boom or trolley? A. The trolley did not move.

Q. Until you had the warning that there was something happened?

A. The trolley did not ever move.

Q. Was that your last bucket that you were to dump before you went off shift?

A. No, I came on shift at 12 o'clock.

Q. You had just come on? A. Yes.

Q. And Mr. Hayes was just going off, is that it?

A. Yes.

Q. You were just coming on and he was going off?

(Testimony of Harold Nelson.)

A. Yes.

The COURT.—Q. You were up there and saw the coal fall over the edge of the hopper. Did it fall from the front or side of the hopper?

A. Front of the hopper.

Q. And the coal fell out slowly?

A. Out of the bucket.

Q. There would not be much of a kick when the coal was falling out slowly, would there? A. No.

Q. The bottom of the bucket is about two feet above the top of the hopper? A. About two feet.

Q. How high is the bucket—we *could that* fact from anybody that knows.

Mr. PEART.—About 3 feet high, the bucket itself.

[115]

The COURT.—Q. About four feet across the top?

A. Yes, about four feet across the top.

Q. And across the bottom?

A. Three feet on the bottom.

Q. It had a foot clear at the top?

A. It comes out like that.

Q. You are quite certain that this coal fell over the front of the hopper instead of either side?

A. Yes.

Testimony of John Benson, for Respondent.

JOHN BENSON, called for the respondent, sworn.

Mr. PEART.—Q. Where do you reside, Mr. Benson? A. 1012 Lindon Street.

Q. What city? A. Oakland.

Q. What is your occupation?

(Testimony of John Benson.)

A. Engineer and foreman.

Q. Of what company?

A. The Western Fuel Company.

Q. How long have you been with that company?

A. About 14 years.

Q. Do you remember the killing of Manuel Souza in August, 1916? A. Yes, I remember it.

Q. Just tell the Court, now, Mr. Benson, something about this hoisting machinery. How long had the company had this machinery? A. Now?

Q. No, in August, 1916?

A. About four or five months.

Q. Are you familiar with other types of hoisting machinery? A. Yes.

Q. Is this the most modern and best adapted for the purpose of hoisting coal as far as you know?

A. Yes, supposed to be.

Q. Was this equipment in good or bad running order on the day that Mr. Souza was killed?

A. Good order.

Q. Did Mr. Hayes correctly describe the electric power as [116] applied to the hoisting of the buckets and the yard-arm and boom on which the bucket is carried toward the hopper and the position of the hopper itself? You heard his testimony.

A. Yes.

Q. He correctly described it? A. Yes.

Q. In other words, when the bucket is hoisted on the signal of the hatch-tender some 70 feet from the deck of the vessel up to the proximity, 10 or 12 feet below the yard-arm that sticks out there, the engi-

(Testimony of John Benson.)

neer simply releases the gravity control and the bucket then runs in over to the hopper? A. Yes.

Q. And the bucket always comes in the same distance over the hopper. Is that correct? A. Yes.

Q. Will you describe to the Court the system by which the bucket is dumped. What does the dumpman have to do?

A. He just has to pull the latch and the bucket dumps itself.

Q. Just pulls the latch and the bucket dumps?

A. Yes.

Q. Does the bucket invert itself, I mean, so as to dump its entire contents at once?

A. The bucket is balanced so that the minute you pull the latch it will dump over and empty the coal.

Q. Does the bucket come back as it empties, as Mr. Hayes described, if it is filled with lumps?

A. It will come back.

Q. You know the kind of coal you had in the buckets in August, 1916. Was it the kind of coal which would cause a bucket to kick?

A. It was mixed, but from the way they testified this morning, I think it was a tub throughout mostly of lumps. I did not see it myself.

Q. You did not see it yourself? A. No.

Q. Would that kind of a tub of coal which the men testified to this morning, would it cause the bucket to kick more than if [117] it was filled with fine screenings or stuff of that kind? A. Yes.

Q. Has the dumpman got anything to do besides pull that latch? A. That is all.

(Testimony of John Benson.)

Q. Is that something which calls for a particularly intelligent skillful man, or one with any particular training?

A. No, it has to be a man who is used to staying high up in the air.

Q. He has to be a man that is used to height?

A. Who is used to rigging.

Q. You selected Mr. Nelson for the purpose on this particular day because he had been a rigger?

A. I did, because I knew what he could do.

Q. Nelson had worked for the company how long before that?

A. He had been working for me I think a year and a half, something like that.

Q. Now, you have frequently seen this bucket dumped yourself, have you not?

A. I have seen them dump.

Q. Is it common or uncommon for coal to fall out of the bucket as it is being hoisted?

A. It will happen sometimes.

Q. Coal will fall out of the bucket as they are going up towards the yard-arm? A. Yes.

Q. Will coal also fall out of the hopper if the bucket is dumped in the ordinary and usual way?

A. It has happened sometimes.

Q. What would you say about the proposition about the coal in this particular case, according to Mr. Nelson, falling out of the front end of the hopper; how could that happen?

A. I cannot see any other way than that the bucket must have been all lumped, like they claim, and that

(Testimony of John Benson.)

they struck the iron plate that the tubs are lined with they must have bounced back. [118] That is the only way that I can see.

Q. That is the only way that you can see that that would happen? A. Yes.

Q. Will the coal on occasions fall out of the hopper if the bucket is dumped straight into the back of the hopper?

A. Well, I would not say; that would depend on the coal.

Q. It could happen with coal in a certain condition and with the hopper in a certain condition?

A. It will happen with lump coal.

Q. In other words, in handling coal there is always danger of falling coal either out of the buckets or out of the hopper with the best and most modern equipment? A. Yes, always is.

Q. How long have you been engaged in handling coal?

A. I have been hoisting coal for over 10 years; I have been foreman now for three or four years. I have been handling coal in different work.

Q. There is always danger from it?

A. There is.

Q. Now, what is the manner of shift in working the men there? Am I correct in saying that the winchman, the dumpman, hatch-tender and the stevedores form one *ship* or gang?

A. The dumpman, the engineer and the men in the hold form one shift.

Q. On this particular occasion Costa's shift were

(Testimony of John Benson.)

just quitting work and Duarte's shift was just coming on? A. Yes.

Q. You were not present and did not see the accident yourself? A. No, I was down in the yard.

Q. Did you get over there shortly afterwards?

A. No, I did not get down there before they had hoisted the man out of the hold.

Q. They had him out of the hold then? A. Yes.

Q. Am I correct in saying that this tub was about 4 feet wide; is it a square box or a parallelogram?

A. No, it is not [119] square; it is about 3 feet 6; somewhere around 3 feet high at the highest point, and I think about the same width at its widest part.

Q. About the same width? A. About that.

Q. Is it wider than it is this way—assume that this is the tub? A. No; it is lower on the back.

Q. It is lower on the back? A. Yes.

Q. When it gets up there it is suspended by a single steel cable or fall? A. Yes, a single fall.

Q. Do these buckets have a tendency to swing to a certain extent, with only 10 or 12 feet of cable supporting it, when the bucket is moving in towards the hopper? A. They are bound to swing some.

Q. They are bound to swing some? A. Yes.

Q. Now, is this latch by which the bucket is dumped the only thing for the dumpman to grab? He reaches up and grabs that? A. Yes.

Q. That is the only thing he could get hold of?

A. Yes.

Q. When that bucket has come in as far as it usually swings it is his job to pull that latch?

(Testimony of John Benson.)

A. It is his job to pull that latch.

Cross-examination.

Mr. BRADLEY.—Q. How soon after this man was killed did you get to the scene of the accident?

A. I did not see Mr. Sousa until he was pulled up out of the hold.

Q. How soon did you get to where the accident was?

A. I didn't go near the ship because I took the man up to the hospital the first thing.

Q. You never did see where the coal was lying?

A. I saw it in the afternoon, yes, about 2 or 3 hours afterwards.

Q. Was there any coal on the deck between the edge of the hatch and the lip of the hopper?

A. Yes, there were a couple [120] of lumps.

Q. Big ones?

A. No; when they fall about 60 or 70 feet they are not so very big.

Q. Did you investigate in the hold to see how much coal had fallen in there, where the man lost his life? A. There were some lumps.

Q. You looked to see, didn't you? A. Yes.

Q. Was there a considerable amount of coal there?

A. No.

Q. Very little? A. A little scattered around.

Q. Rather fine coal or was it crushed up by the fall?

A. I guess it probably weighed 5 or 10 pounds.

Q. You say that this bucket swings when it is loaded with the big lumps and swings some even if

(Testimony of John Benson.)

loaded with small coal? A. Yes.

Q. That is a source of danger for falling coal; have you ever done anything to check that knowing that it was dangerous?

Mr. PEART.—I object to that as immaterial, irrelevant and incompetent. I will withdraw the objection.

A. That belongs to the stevedore game; to hoist and swing; it goes up and comes in at the same time; that is the principle of the work.

Q. There is great danger with a swinging bucket that it will throw coal?

A. There is danger in any rigging when you hoist.

Q. That is the particular source of danger?

A. Swinging in any rigging there is.

Q. The danger is in the swinging, the kick back from the unloading?

A. No; you see it don't come along the boom; it comes free of the boom.

Q. It is suspended from the boom? A. Yes.

Q. Does the dump-tender get more wages than the ordinary [121] stevedore, a higher class of employment? A. No.

Q. What does he get?

A. At that time he got I think $75.

Q. Is it his duty at all to observe the effect of tipping that for dumping, or can he just dump it and forget it?

A. That is his duty, to see that the coal drops out the bucket.

Q. That is his duty? A. Yes.

(Testimony of John Benson.)

Q. So *he more* to do than merely swing that tug, he has the duty of supervision hasn't he, to see that everything works all right?

A. That is all a man can do.

Q. Who sent Nelson up there? A. I did.

Q. How long had you know him?

A. I had known him for—he had been working for me about a year and a half.

Q. You had the authority to send him up there, didn't you? A. Yes.

Q. You knew he had never done that kind of work before?

A. I knew he was competent to do the work.

Q. You knew that he had never done that kind of work before?

A. I wouldn't say—I don't know whether he had or not.

Q. You would not say whether he had or not?

A. No.

Q. There was nothing said about it between you and him?

A. No, I just sent the man up there because I knew he was competent.

Q. He was just going on that shift, wasn't he?

A. He had been up there all morning.

Q. He had been up there all morning?

A. Yes.

Q. He was wrong then when he said he was going on? A. He came from No. 3 tower.

Q. He had been working all morning at another place? A. He came on that shift. **[122]**

(Testimony of John Benson.)

Q. But he had not been working at that place?

A. In the next tower he had been dumping all morning.

Q. What is the angle to the lip of that bucket?

A. I should say about 45 degrees.

Q. Forty-five degrees? A. Yes.

Q. Now, if a lump of coal had hit that wouldn't it be more likely to bounce in than out at an angle of 45 degrees? A. What do you mean?

Q. You explained to the Court a while ago that a lump would hit that and bounce all out here with a 45 degree angle. Aren't you satisfied that if lump of coal did hit there it would bounce in instead of out?

A. There are two 45-degree angles. Which one do you refer to?

Q. Where is the other 45-degree angle?

A. Over on the other side.

Q. How far? A. I couldn't say.

Q. How far is it from here to the back of it where the other angle is?

A. About six feet, I should think.

Q. Do you mean to say it is only six feet from the lip of the bunker to the back where the other angle is?

A. There is one on front and one on back, and the coal could strike either one.

Q. You mean to say a lump of coal could bounce from the back of the bunker six feet and out?

A. I have not seen it in this particular hopper, but

(Testimony of John Benson.)

I have seen it in others, where I have been hoisting for years.

Q. You have been at that plant ever since it was started, haven't you? A. Yes.

Q. Is there anybody who is representing the company who has charge of the matter of the change of shifts or gangs as **[123]** come off or go on?

A. There is the foreman for each gang; they are working under me.

Q. They are working under you? A. Yes.

Q. Did you have any direct superintendence on this day, on this occasion, to see that the shifts were properly changed and that one whole shift did not go on until the other shift came off, or that one did not come off until the other came on, so that the work would not be continued when the whistle blew?

A. No; we are union men and it is the rule to go down in the hold at 12 o'clock.

Q. They were complying with the rule weren't they?

A. Probably they were; I did not see them.

Q. But you exercised no superintendence to see that Benson, Nelson and Hayes, their work should be so co-ordinated that they would be working together?

A. I could not stay in two different places and see the men get relieved when it was 12 o'clock.

Q. Do you have any rule with reference to that?

A. The union has rules that whenever you change shifts you change at 12 o'clock, and then men go

(Testimony of John Benson.)

down in the hold when the whistle blows.

Q. The union does not boss the job; it does not superintend the job? A. They cover the job.

The COURT.—You had better not go into that.

Mr. BRADLEY.—Q. This bucket does not flop clear over, upside down, does it?

A. Not quite clear over.

Q. It dumps at a very high angle? A. Yes.

Q. How does it right itself after dumping?

A. It is balanced so that it comes back and rights itself. **[124]**

Redirect Examination.

Mr. PEART.—Q. Mr. Benson, I understood Mr. Costa to say when he was on the stand this morning that the Stevedores in his gang were loading coal right in the hatch. I called his attention to the fact that these buckets had wheels on them to be wheeled over to the interior of the vessel away from the hatch, to clean up and that, and he told me in answer to my question that there was plenty of coal right in the hatch. Now if that is so—in the first place, is that so, or not?

Mr. BRADLEY.—I object to the question as not proper cross-examination.

The COURT.—The objection is overruled.

Mr. PEART.—Was there coal there to be loaded directly in the open hatch? A. No.

Q. Counsel asked you this question, as to whether or not you observed any great quantity of coal presumably as having fallen out of this bucket. I was trying to understand how you could observe that if

(Testimony of John Benson.)

the hatch was full of coal that the men were loading; what quantity was there in the hold of the vessel below this open hatch?

A. We do not use the small buckets until the hatch is cleaned out. We use the grab-buckets until that time and then we use the small tubs.

Q. You use another type of bucket when the coal is in the face of the open hatch? A. Yes.

Q. And these buckets were being used to clean out the inside of the ship with, were they?

A. Clean out the wings.

Q. What coal was there under that open hatch when you saw it in the afternoon?

A. There were probably a few lumps.

Q. A few lumps? A. Yes.

Q. Was the hold of the vessel otherwise clean of coal underneath the open hatch?

A. To the middle of the hatch, yes. [125]

Q. What coal was there there for the men to work in?

A. At the wings.

Q. Were the wings covered by the deck?

A. No. We take all the coal we can from the wings before we put the small tubs in and then we leave some 6 or 8 tons of coal in the wings.

Q. Looking down at the "Tancrid" here it seems to be a solid deck. If the coal was cleaned out right underneath the open hatch there then the men were working under the decks, weren't they? in filling these buckets?

A. Of course there is coal out in the wings; they

(Testimony of John Benson.)

have got room to take the coal; they take the stuff and they work in under the covered deck.

Q. They work in under the covered deck

A. Yes.

Q. From the condition of the vessel as you saw it there at 2 o'clock in the afternoon, the men in the morning had been working around cleaning up?

A. Yes.

Q. There was no other coal for them to work in directly within—directly under the open hatch?

A. No, there was no coal in the open hatch.

Q. There was just a little coal that came out of this bucket? A. Yes.

Recross-examination.

Mr. BRADLEY.—Q. Not enough to hurt a man, if it fell on him: Is that the idea?

A. It would hurt you all right.

Q. Do you know whether the grab-bucket was in operation that day or had it been broken down?

A. We had not broken a grab-bucket.

Q. Was the machine that operated it broken down that day? Were you using the tubs because the machine had broken down?

A. We use the small tubs in every ship, after we are through **[126]** with the grab-buckets.

Q. It was not out of order?

A. Not that I know of.

Mr. PEART.—Q. Do you know Mr. Benson when they put these buckets on and when they stopped using the grab-buckets?

(Testimony of John Benson.)

A. No, I don't exactly remember what time they put them on.

Q. But from your observation there at 2 o'clock in the afternoon they were not working in any coal under the hatch?

A. Not working under the hatch; they were working away from the hatch.

Q. In portions of the hold covered by the deck?

A. Yes.

Mr. PEART.—That is our case.

Testimony of Manuel Repose, for Libelant (In Rebuttal).

MANUEL REPOSE, recalled in rebuttal.

Mr. HEIDELBERG.—Q. I believe you testified this morning that you watched this bucket come up and go into the hopper to be dumped? A. Yes.

Q. You testified also I believe that that bucket came out? A. Yes.

Q. Right away? A. Yes.

Q. That bucket goes in on what they call a carriage with wheels? A. Yes.

Q. Did you notice whether or not when that bucket came out that it came out because that carriage was pulled back, or did it come out because it was swung back?

A. It came back when it made a swing.

Q. Did that carriage move out with the bucket?

A. It came [127] right out again.

Q. How far out beyond the bucket did that go?

A. It came about four feet out of the bunker.

(Testimony of Manuel Repose.)

Q. What was the bucket doing by the time that that was four feet outside of the bunker?

A. I don't know; when I hollered I ran underneath so I didn't see.

Q. You testified this morning that you saw the coal spilling out?

A. I saw the coal all falling out.

Q. You are aware of how much coal comes in a bucket? A. Yes.

Q. How much of this coal would you say spilled out of this bucket? down at the hold, just from what you saw?

A. It was over 200 pounds; it was all big lumps that were all filled in by hand.

Q. Would that be half the bucket, or what?

A. More than half the bucket.

Q. You are positive, are you, from your observation that that coal fell out of the bucket and not out of the hopper?

A. Not out of the hopper, out of the bucket.

Cross-examination.

Mr. PEART.—Q. You have been a stevedore three months? A. Yes.

Q. Did you estimate how much coal was falling by seeing it in the air, or did you figure it?

A. No, I did not figure it because I ran away, when I saw all those lumps falling down.

Q. Did you look at it after it got down on the deck?

A. I run underneath the deck there because I didn't want the coal to hit me.

(Testimony of Manuel Repose.)

Q. You ran under the covered portion of the deck, didn't you? You got away from the hatch and ran here where it was covered. A. Yes. **[128]**

Q. Did you see the coal down there afterwards, after it fell down? Did you see about half a bucket there on the deck afterwards?

A. I didn't see it because I went out to my dinner. I know that coal fell right down. It fell right on top of the hatch too, some came right down. Of course when I looked up I saw the whole thing coming down and I ran away.

Q. You could look up from where you were under the hatch?

A. Yes, and I could see where it was dumped too.

Q. You could see the man who was dumping it?

A. Yes.

Q. Plainly? A. Yes.

Testimony closed.

[Endorsed]: Filed Jun. 12, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[129]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libellees.

Opinion and Order for Entry of Decree in Favor Libelants, etc.

HENRY HEIDELBERG, Esq., and CHRIS M. BRADLEY, Esq., Proctors for Libelant.

IRA S. LILLICK, Esq., and HARTLEY F. PEART, Esq., Proctors for Libelees.

The legal principles involved in this action are by no means clear, but a careful consideration of all the authorities cited by the parties, or found by myself, leads me to the following conclusions:

1. The Workman's Compensation Act of California does not apply where the employee killed or injured is a stevedore engaged in loading or discharging cargo. Southern Pacific Co. vs. Jensen, 244 U. S. 205.

2. In such case the following provision of said Act, (Sec. 12 C): "In all other cases, where the conditions of compensation do not occur, the liability of

the employer shall be the same as if this act had not been passed," prevents the other provisions of the Act from applying where, [130] as here, a first condition necessary for the application of the Act is lacking, that is, that both employer and employee are subject to the compensation provisions of the Act. The repealing clauses of the Act therefore do not repeal the laws theretofore enacted which would be applicable to the instant case.

3. Section 1970 of the Civil Code of California would warrant an action and recovery in the courts of the state, because the accident here was caused by the negligence of a co-employee employed on a machine or appliance other than that upon which the deceased was employed (Korander vs. Penn Bridge Co., 16 Cal. App. 249, and because it was also due to the negligence of the hatch-tender in not giving warning and the hatch-tender under the evidence was one having the right to control and direct the services of deceased (Foutz vs. City of Los Angeles, 167 Cal. 487).

The Rosenberry Act of 1911 might also warrant such action and recovery because it does away with the doctrine of assumption of risk, and the defense that the accident was caused by the negligence of a fellow-servant.

4. As the beneficiaries here were for a year engaged in the prosecution of their supposed rights under the Workman's Compensation Act, their delay in bringing the present action is accounted for so as to remove the bar of limitations. Fill vs. Cunard Co., 217 Fed. 84.

5. Where a right of action is given by a state statute it will be enforced in the Admiralty Court if the cause of action is one of admiralty cognizance, Buttner vs. Adams, 236 Fed. 105, and the injuries to a stevedore and the rights and liabilities of the parties in connection therewith are within the admiralty jurisdiction. S. P. Co. vs. Jensen, supra. **[131]**

6. The death of Souza was due to the negligence of Hayes in withdrawing the bucket from the hopper before it was fully dumped, and to the negligence of the hatch-tender in not giving warning to those in the hold.

7. The deceased was not guilty of contributory negligence in being where he was, as there was coal there to be discharged and he was preparing to discharge it. Nor did the risk of his employment include the dumping of the quantity of coal that fell through the hatch at the time of the accident, even though it be conceded that he assumed the ordinary risk of his employment due to the occasional falling of a lump of coal.

8. From these conclusions it follows that libelant is entitled to recovery. A decree will be entered against the Fuel Company for the sum of $9,506.00 and costs, being $10,000.00 less $494.00 already paid.

Libelant may amend by including in his averments that the hatch-tender was negligent and that the accident was also due to such negligence.

The libel will be dismissed as to Nelson and Weisel, with costs awarded to them.

M. T. DOOLING,

Judge.

April 30, 1918.

[Endorsed]: Filed Apr. 30, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[132]**

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Second Amended) Libel for $50,000 Damages.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, in and for the Northern District of California, First Division:

Now comes the above-named libelant, Antone Garcia, and by leave of Court first had and obtained, files this his second amended libel:

I.

Western Fuel Company now is and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and regularly transacting business in said State.

II.

Manuel Souza died intestate in the city of Oakland, county of Alameda, State of California, on the 5th day of August, 1916, being at the time of his death a resident of the County of Alameda, State of California, and leaving estate therein.

Thereafter and on the 15th day of March, 1918, the Superior Court of the State of California, in and for the county of Alameda, by its order duly given, made and entered, appointed **[133]** said Antone Garcia, libelant herein, administrator of the estate of said Manuel Souza, deceased, and directed that letters of administration upon said estate be issued to him upon his qualifying as such administrator.

Thereafter and on the 15th day of March, 1918, said Antone Garcia duly qualified as such administrator, letters of administration upon the estate of said deceased were thereupon duly issued to said Antone Garcia, and he ever since has been and now is the duly appointed, qualified and acting administrator of the estate of said Manuel Souza, deceased.

III.

On the 5th day of August, 1916, said Manuel Souza was in the employ of libelee, Western Fuel Company, a corporation, being engaged in the occupation of stevedore, his duty at said time consisting of the unloading of coal for said Western Fuel Company, a corporation, from the steamer "Tancred," and was working at said time in the hold of said vessel.

IV.

On said 5th day of August, 1916, and while said

Manuel Souza was working as aforesaid on board of said vessel, and while in the employ and service of said Western Fuel Company, a corporation, said Manuel Souza lost his life in the following manner:

Said vessel was at said time at anchor in Oakland Creek, a navigable tributory of the bay of San Francisco, in the State of California. Said vessel was at said time under the charter of the Western Fuel Company, a corporation, and was loaded with coal consigned to said Western Fuel Company, a corporation, and said vessel was at said time lying alongside of Howard Wharf, located in said Oakland Creek, and was discharging coal from the main hatch of said vessel into hopper No. 2 of said wharf in the following manner. **[134]**

Said coal was first loaded from the hold of said vessel into steel bucket or container, and when said bucket or container was sufficiently loaded with coal said bucket or container was hoisted to a height of about 100 feet, or thereabouts, and thereupon said bucket or container was transferred by means of a yard arm boom a distance of 50 feet, or thereabouts, into said hopper or bunker. All of said operations of hoisting and transferring being done by means of an electric hoist or winch under the supervision and control of George Weisel, Engineer or "winchman," in the employ of said Western Fuel Company, a corporation. When said bucket or container was inside of said bunker or hopper it was the duty of Harry Nelson, "dumpman," in the employ of said Western Fuel Company, a corporation, to dump said bucket or container in such manner as to cause the coal con-

tained therein to discharge or spill into said hopper or bunker.

At all of the times herein mentioned libelee, Western Fuel Company, a corporation, had a hatch-tender in charge of the unloading crew of which Manuel Souza was a member, and it was the duty of said hatch-tender to warn said Manuel Souza, while at work as aforesaid, of any danger from falling coal, or otherwise.

On said August 5, 1916, libelees herein so negligently and carelessly performed said operation of transferring and dumping said bucket or container as to cause a great quantity of coal therein contained to be discharged or spilled into the hold of said vessel, instead of being wholly discharged or spilled into said hopper or bunker, and negligently and carelessly failed to give said Manuel Souza warning thereof, by reason of which negligence and carelessness of libelee, Western Fuel Company, a corporation, or its agents, and libelees, George Weisel and Harry Nelson, said Manuel Souza was struck upon the head by said coal so discharged or [135] spilled into the hold of said vessel and fatally injured, to wit, his skull being fractured, from which injury said Manuel Souza, on the 5th day of August, 1916, died.

V.

Said death of said Manuel Souza was caused by the carelessness and negligence of libelees herein, and without any negligence or carelessness on the part of said Manuel Souza.

VI.

Said Manuel Souza, on the 5th day of August, 1916, was and for a long time prior thereto had been the husband of Mary Souza, and was, on the 5th day of August, 1916, the father of Eva Souza, Willie Souza, Elma Souza, Mabel Souza and Manuel Souza, Jr., minors of the age of eight (8) years, five (5) years, four (4) years, three (3) years, and six (6) months, respectively. Said Eva, Willie, Elma, Mabel and Manuel Souza were at said time wholly dependent upon said Manuel Souza for maintenance and support. Said Manuel Souza at said time was of the age of thirty-eight (38) years, being strong, able-bodied and healthy, and a sober, hardworking, industrious man, and earning wages as stevedore in the amount of Thirty-five Dollars ($35) per week.

VII.

On or about the 25th of April, 1917, the Industrial Accident Commission of the State of California, after due proceedings before said body, duly and regularly made an order in favor of Mary Souza, and against the Western Fuel Company, a corporation, ordering said Western Fuel Company, a corporation, to pay to Mary Souza a certain sum of money, basing such award of said sum of money upon the finding of said Commission that said Manuel Souza came to his death while in the employ of said Western Fuel Company, a corporation, and while working as stevedore for said Western **[136]** Fuel Company, a corporation; from the award made as aforesaid said Western Fuel Company, a corporation, took an appeal to the Supreme Court of the State of Cali-

fornia, which said Supreme Court of the State of California, on or about the 6th day of August, 1917, made an order reversing, annulling and setting aside said award so made as against the said Western Fuel Company, a corporation, on the grounds that said Industrial Accident Commission was without jurisdiction to make the same.

VIII.

By reason of the death of said Manuel Souza, so caused by the negligence and carlessness of libelees herein, the heirs of said Manuel Souza, as above set out, have suffered damages in the sum of fifty thousand dollars ($50,000), no part of which has been paid.

IX.

All and singular of the premises herein are true and within the admiralty jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, libelant herein prays that process may issue in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction against said libelees, and that they may be cited and admonished to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the aforesaid damages with costs, and that libelant herein have such other and further relief as in law and justice he may be entitled to receive.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant. [137]

State of California,
City and County of San Francisco,—ss.

Antone Garcia, being duly sworn, deposes and says:

That he is the administrator of the estate of Manuel Souza, deceased; that as such administrator he is libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

ANTONE GARCIA.

Subscribed and sworn to before me, this 2d day of May, 1918.

[Seal] HARRY H. SULLIVAN,
Notary Public.

Received a copy of the within this 3d day of May 1918.

IRA S. LILLICK,
HARTLEY F. PEART,
Proctors for Libelee, Western Fuel Company.

[Endorsed]: Filed May 3, 1918. W. B. Maling. Clerk. By C. W. Calbreath, Deputy Clerk. **[138]**

At a stated term of the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division (in Admiralty), held at the courtrooms in the Postoffice Building, in the City and County of San Francisco, State of California, on the 18th day of March, 1918. Present: Honorable MAURICE T. DOOLING.

IN ADMIRALTY—No. 16, 248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Final Decree.

This case having been heard on the pleadings and proof, and evidence, oral and documentary, having been introduced, and having been argued and submitted by the proctors of the respective parties, and due deliberation having been had, it is now

ORDERED, ADJUDGED AND DECREED that libelee, Western Fuel Company, a corporation, pay to said Antone Garcia, as administrator of the estate of Manuel Souza, deceased, the sum of nine thousand five hundred six dollars ($9,506), being ten thousand dollars ($10,000) less the sum of four hundred ninety-four dollars ($494.00) heretofore paid to

Mary Souza, widow of Manuel Souza, and costs in the sum of forty-three dollars and ninety cents ($43.90), and it is further

ORDERED, ADJUDGED AND DECREED that said libel is hereby dismissed as to libelees George Weisel and Harry Nelson, and said libelees are herein awarded their costs.

M. T. DOOLING,
Judge.

Dated at San Francisco, California, this 13 day of May, 1918. **[139]**

Copy of within served on Hartley F. Peart, proctor for libelee Western Fuel Co. the 3d day of May, 1918.

HENRY HEIDELBERG.

[Endorsed]:Filed May 13, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 8, Judg. and Decrees, at page 93. **[140]**

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

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Notice of Appeal.

To Antone Garcia, as Administrator of the Estate of Manuel Souza, Deceased, and to Chris M. Bradley and Henry Heidelberg, Esquires, His Proctors, and to W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, Southern Division, First Division:

You, and each of you, will please take notice that Western Fuel Company, a corporation, libelee, appeals to the United States Circuit of Appeals, for the Ninth Circuit, from the Final Decree of the District Court of the United States, for the Northern District of California, entered in said cause on the 13th day of May, 1918.

Dated: May 22d, 1918.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee.

Due service and receipt of a copy of the within notice, etc., is hereby admitted this 22d day of May, 1918.

CHRIS. M. BRADLEY,
HENRY HEIDELBERG,
Proctors for Libelant.

[Endorsed]: Filed May 22, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[141]**

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In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Assignment of Errors.

Now comes Western Fuel Company, libelee and appellant herein, and claims that in the record, opinion, decision and final decree in said cause, there is manifest a material error, and said appellant now makes, files and presents the following Assignment of Errors, on which it relies, to wit:

1. That the District Court erred in rendering the decree entered herein upon the 13th day of March, 1918, against the libelee, Western Fuel Company.

2. That the District Court erred in overruling the exceptions to the amended libel on file herein, upon each of the following grounds, to wit:

(a) That said amended libel did not state facts sufficient to constitute a cause of libel against the libelee.

(b) That it does not appear from the said

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amended libel under what statute the libelant claims a cause of action. **[142]**

(c) That the first amended libel was insufficient and it could not be ascertained therefrom how, or wherein, this libelee was negligent.

(d) That the cause of action set forth in the first amended libel is barred by the provisions of Section 340, subdivision 3, of the Code of Civil Procedure of the State of California.

(e) That the cause of action set forth in the libel is barred by the laches of the libelant.

3. That the District Court erred in permitting the libelee to file the second amended libel, which said second amended libel was filed on the 3d day of May, 1918.

4. That the District Court erred in failing to find that the alleged cause of action set forth in the libel is barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure of the State of California.

5. That the District Court erred in failing to find that no cause of action under said libel exists under any statute of the State of California, and hence none exists in admiralty.

6. That the District Court erred in finding that said libelee is liable in damages to the libelants by reason of the death of Manuel Souza.

7. That the District Court erred in failing to find that the death of Manuel Souza was caused solely through his own negligence, without fault or privity of libelee, Western Fuel Company.

8. That the District Court erred in failing to find

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that Manuel Souza's death was caused while voluntarily, and **[143]** without orders, undertaking to do the thing in which he was engaged at the time of the accident.

9. That the District Court erred in failing to find that the death of Manuel Souza was caused while in the performance of duties not within the scope of his employment, and with the nature and danger of which he was acquainted.

10. That the District Court erred in failing to find that the proximate cause of the accident was Manuel Souza's own negligence, in being at the place and position on the steamer at the time of the accident.

11. That the District Court erred in failing to find, if there was any negligence other than that of Manuel Souza himself, that it was the negligence of a fellow-servant, for which libelee is not responsible.

12. That the District Court erred in entering the decree for libelants for damages and costs.

13. That the District Court erred in not dismissing the libelant's libel.

14. That the District Court erred in failing to find that there was no statute in California at the time of the death of Manuel Souza affording a cause of action for the death of an employee under a maritime contract occurring through the negligence of an employer, and/or a fellow-servant.

15. That the District Court erred in failing to find that the evidence shows affirmatively that Manuel Souza was killed by an ordinary risk of his em-

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ployment which he had assumed, thus barring recovery.

16. That the District Court erred in holding that the Workmen's Compensation Act of California, sec. 12c, did not repeal the laws of California theretofore enacted, and particularly [144] sections 377, C. C. P., of the State of California, and 1970, C. C., of the State of California, as affording a cause of action to the libelant.

17. That the District Court erred in failing to find that Manuel Souza was a mere licensee at the time of his death and his death occurred not while in the performance of his duties within the scope of his employment.

18. That the District Court erred in holding, as shown by its decision, that the negligence causing the death of Manuel Souza was that of a coemployee (presumably the engineman or dumpman) employed on a machine or appliance other than that upon which the deceased was employed, as the evidence affirmatively shows that Manuel Souza was employed on the same machine or appliance.

19. That the District Court erred in holding, as shown by its decision, that the hatch-tender was not the fellow-servant of the deceased Manuel Souza.

20. That the District Court erred in failing to find that Manuel Souza was not guilty of contributory negligence, and that his negligence was not gross in comparison with that of the libelee, Western Fuel Company.

21. That the District Court erred in applying the provisions of section 1970 of the Civil Code of the

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State of California, in so far as the same defined a fellow-servant.

22. That the District Court erred in applying the provisions of the Roseberry Act of 1911, Statutes of the State of California, in so far as the same abolishes the doctrine of assumption of risk and the doctrine of negligence of a fellow-servant.

23. The District Court erred in not applying the principles of the admiralty law; namely, of contributory negligence and the doctrine of contribution flowing therefrom, the doctrine [145] of assumption of risk, and the doctrine of negligence of a fellow-servant.

In order that the foregoing Assignment of Errors may be and appear of record, said appellant files and presents the same and prays that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided, and said appellant prays a reversal of the decree herein heretofore made, and entered in the above-entitled cause, and appealed from.

Dated: July 9th, 1918.

IRA S. LILLICK,
HARTLEY F. PEART,
Proctors for Libelee and Appellant Western Fuel Company.

Due service and receipt of a copy of the within assignments of error is hereby admitted this 9th day of July, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

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[Endorsed]: Filed Jul. 9, 1918. W. B. Maling, Clerk. By. C. M. Taylor, Deputy Clerk [146]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Order Staying Execution.)

GOOD CAUSE APPEARING THEREFOR: It is hereby ordered that execution on the judgment heretofore made and entered in the above-entitled case be, and the same is, hereby stayed ten (10) days from date hereof.

Dated: May 24, 1918.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed May 24, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [147]

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In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

(Supersedeas and Cost Bond on Appeal.)

KNOW ALL MEN BY THESE PRESENT: That the Western Fuel Company, a corporation, as principal and Globe Indemnity Company, a corporation, as surety, are held and firmly bound unto Antone Garcia as administrator of the estate of Manuel Souza, deceased, in the full and just sum of Eleven Thousand Dollars ($11,000), to be paid to the said Garcia, his successor, executor, administrator or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of May, 1918.

WHEREAS, the above-named Western Fuel Company, a corporation, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree of the District Court in favor of

the above-named libelant, Antone Garcia, as administrator of the estate of Manuel Souza, deceased, signed on the 13th day of May, 1918, and entered on the 13th day of May, 1918, in the above-entitled cause, by the District Court of the United States in and for the Southern Division of the Northern District of California, First [148] Division thereof; praying that the said decree may be reversed; and

WHEREAS, the above-named appellant, Western Fuel Company, a corporation, desires to stay the execution of said decree in addition to giving bond for costs in the sum of Two Hundred and Fifty ($250.00) Dollars;

NOW, THEREFORE, the conditions of the above obligation are such that if the above-named appellant, Western Fuel Company, a corporation, shall prosecute its appeal to effect, and answer all damages and costs, if the appeal is not sustained, and further, that if said appellant will abide by and perform whatever decree may be rendered in the said cause by the said United States Circuit Court of Appeals for the Ninth Circut, or the mandate of said Court by the Court below, then this obligation shall be void; otherwise, this obligation shall remain in full force and effect.

WESTERN FUEL COMPANY,

[Seal] By D. E. NORCROSS,

Secretary.

GLOBE INDEMNITY COMPANY,

By DAVID DUNCAN, (Seal)

Attorney in Fact.

The premium charged for this bond is one hundred twelve 50/100 dollars per annum.

State of California,
City and County of San Francisco,—ss.

On this 24th day of May, in the year one thousand nine hundred and eighteen, before me, John McCallan, a notary public in and for the city and county of San Francisco, personally appeared David Duncan known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Globe Indemnity Company and acknowledged to me that he subscribed the name of Globe Indemnity Company thereto as principal, and his [149] own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 12th, 1921.

State of California,
City and County of San Francisco,—ss.

On this 24th day of May, in the year one thousand nine hundred and eighteen before me, J. R. Cornell, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared D. C. Norcross, known to me to be the Secretary of Western Fuel Company, the corporation described in and that executed the within in-

strument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office, in the said city and county of San Francisco, the day and year in this certificate first above written.

[Seal] J. R. CORNELL,

Notary Public, in and for the City and County of San Francisco, State of California.

My commission expires October 16, 1921.

[Endorsed]: Filed May 28, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[150]**

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Stipulation and Order Concerning Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED,

by and between the proctors for the respective parties hereto, that all the exhibits introduced in evidence at the hearing of the above-entitled action, before the above-entitled court, may be omitted from the Apostles on Appeal in said cause, and may be filed in the United States Circuit Court of Appeals, for the Ninth District, in the original form in which they were respectively introduced before said Court at the trial of said case, and be considered as original exhibits for the Apostles on Appeal.

Dated: June 13th, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee, Western Fuel Co.

It is so ordered.

M. T. DOOLING,
Judge. [151]

[Endorsed]: Filed Jun. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [152]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,

Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,

Libelees.

Stipulation and Order Extending Time for Filing Apostles on Appeal.

IT IS HEREBY STIPULATED and agreed that libelant in the above-entitled case may have thirty (30) days from and after June 21st, 1918, within which to procure the filing in the United States Circuit Court of Appeals for the Ninth Circuit of the apostles and word in said cause with the certification of the above District Court thereunto attached.

Dated: June 13th, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

HARTLEY F. PEART,
IRA S. LILLICK,
Proctors for Libelee Western Fuel Company.

It is so ordered.

M. T. DOOLING,
Judge, United States District Court.

[Endorsed]: Filed Jun. 15, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[153]**

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,248.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Libelant,

vs.

WESTERN FUEL COMPANY, a Corporation, HARRY NELSON and GEORGE WEISEL,
Libelees.

Stipulation and Order Extending Time to File Apostles on Appeal.

IT IS HEREBY STIPULATED AND AGREED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals, for the Ninth Circuit may be extended to and including the 17th day of August, 1918.

Dated: San Francisco, California, July 17, 1918.

HENRY HEIDELBERG,
CHRISTOPHER M. BRADLEY,
Proctors for Libelant.

Pursuant to the foregoing stipulation, it is hereby ordered that the time for the printing of the record, and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 17th day of August, 1918.

Dated: San Francisco, California, July 20, 1918.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Jul. 20, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [154]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 154 pages, numbered from 1 to 154, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Mary Souza, et al., etc., vs. Western Fuel Company, a Corp., et al., No. 16,248, as the same now remain on file and of record in the office of the clerk of said District Court; said Apostles having been prepared pursuant to and in accordance with the "Praecipe for Apostles on Appeal" (a copy of which is embodied in these Apostles), and the instructions of the proctors for respondents herein.

I further certify that the cost for preparing and

certifying to the foregoing Apostles on Appeal is the sum of Sixty-three Dollars and Forty-five Cents ($63.45), and that the same has been paid to me by the proctors for the respondents herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of August, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [155]

[Endorsed]: No. 3195. United States Circuit Court of Appeals for the Ninth Circuit. Western Fuel Company, a Corporation, Appellant, vs. Mary Souza, and Eva Souza, Willie Souza, Elma Souza, Mabel Souza, and Manuel Souza, by Antone Garcia, Their Guardian Ad Litem, and as Administrator of the Estate of Manuel Souza, Deceased, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 9, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Apostles on Appeal. Filed Aug. 22, 1918. F. D. Monckton, Clerk.

No. 3195

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order of Submission.

Upon motion of Mr. Henry Heidelberg, counsel for the appellee, ORDERED leave granted to file Photograph of Wharf, Libelant's Exhibit "B."

Upon motion of Mr. Heidelberg, and good cause therefor appearing, ORDERED appeal submitted to the Court for consideration and decision, on briefs, without oral argument.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the Third day of February, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the cases were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the minutes of this court, in each of the causes in accordance with the opinion filed therein: * * * Western Fuel Company, a Corporation, Appellant, vs. Antone Garcia, as Administrator of the Estate of Manuel Souza, Deceased, Appellee. No. 3195. * * *

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Opinion U. S. Circuit Court of Appeals.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Before GILBERT, ROSS and HUNT, Circuit Judges.

ROSS, Circuit Judge:

The widow and minor children of Manuel Souza, deceased, filed, August 21st, 1917, in the court below, a libel against the appellant and two of its employees, to recover damages growing out of the death of the deceased while working as a stevedore in unloading coal from the hold of the steamer "Tancred," at the time operated by the appellant company under charter and discharging its cargo at the Howard Wharf in Oakland Creek, California—it being alleged that the death of the deceased was caused by the negligence of the libelees in the improper handling of the bucket by which some of the coal was spilled and fell upon the deceased, killing

him, on the 5th day of August, 1916. Subsequently the appellee was appointed administrator of the estate of the deceased and as such filed an amended libel, upon which the cause was tried. It will be seen from what has been said that the original libel was not filed until a few days more than one year after the death of the deceased.

The record shows, however, that on April 25th, 1917, his widow and minor children commenced proceedings for the recovery of the damages sustained by them, before the Industrial Accident Commission of the State of California, pursuant to the provisions of the Workmen's Compensation Act of 1913 (Stats. 1913, chap. 176), which Commission awarded them damages but which proceedings were subsequently annulled by the Supreme Court of the State following the decision of the Supreme Court of the United States in the case of Southern Pacific Company vs. Jensen, 244 U. S. 205, and other decisions of that court, the last of which was decided by that tribunal January 7th, 1919, in the case entitled Union Fish Company vs. John W. Erickson (Advance Sheets).

The present case being in admiralty it is obvious that no provision of the California statute above referred to has any application here, the rights, obligations, and liabilities of the respective parties being measured by the maritime law. In addition to the cases already cited, see The Lottawanna, 21 Wall. 558, 575; Butler vs. Boston Steamship Co., 130 U. S. 527, 557; Workman vs. Mayor, etc. of New York, 179 U. S. 552; South Covington & Cincinnati

Street Ry. Co. vs. South Covington et al., 235 U. S. 537; The Steamship Jefferson, 215 U. S. 130; The Chusan, Fed. Cas. No. 2717.

It is well settled that in the absence of an act of Congress or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or on waters navigable from the sea, which is caused by negligence. The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201. Where, however, a statute of the state where the injury occurs gives such right of action, it will be enforced by a court of admiralty if of admiralty cognizance. Authorities *supra*, and Buttner vs. Adams, 236 Fed. 105; The Horsa, 232 Fed. 997; 1 Corp. Jur. 1290, and cases there cited.

There being no United States statute upon the subject, the appellee's right to recover in the instant case must be found in a statute of California.

Section 377 of its Code of Civil Procedure provides:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may

be given as under all the circumstances of the case, may be just."

The right upon which the judgment of the Court below rests was clearly given by that statute.

Subsequently Section 1970 of the Civil Code of California was enacted, which provides, among other things, as follows:

> "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a coemployee engaged in another department of labor from that of the employee injured. * * * "

In the case of Gonsalves vs. Petaluma etc. Ry. Co., 173 Cal. 264, 266, the Supreme Court of that

state, after referring to the question as to the extent, if at all, the above-mentioned sections of the California statutes conflicted, said:

"It was for the consideration of this important question that a hearing before this Court was ordered. Heretofore this Court has not been called upon to determine the matter. Thus in Ruiz vs. Santa Barbara Gas Co., 164 Cal. 188 (128 Pac. 330), we declared that in that case it was immaterial whether it be considered that the action was brought by virtue of section 377 of the Code of Civil Procedure or by section 1970 of the Civil Code. Again in Pritchard vs. Whitney Estate Co., 164 Cal. 564 (129 Pac. 989), the only pronouncement of the Court upon this subject is that 'so far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action.' This, of course, is a perfectly sound declaration, but it is giving it an unwarranted meaning to say that by it this Court even intimated that the general provisions of section 377 of the Code of Civil Procedure were abrogated in every case of actions by the representatives of deceased employees. Indeed, it would call for very direct and positive language to lead a court to say that the lawmakers in giving the general right of action provided for by section 377 of the Code of Civil Procedure to everybody else and therein declaring that in every such action such damages may

be given 'as under all the circumstances may be just,' meant to deny that right of action and forbid that measure of recovery in the case of representatives of deceased employees, and to declare that as to them there could be no recovery at all unless the heirs of such employees were actual dependents upon them. But there is no language in our law which prompts, much less which forces, the view that the legislature thus designed to restrict this right of action in cases where the death of an employee had been negligently caused. Section 377 of the Code of Civil Procedure still remains in full force and gives the right of action and fixes the measure of recovery in all cases. Section 1970 of the Civil Code is to be construed with section 377, not as superseding it, and so construed it means, as declared in Pritchard vs. Whitney Estate Co., 164 Cal. 564 (129 Pac. 989), that when section 1970 has created rights of action growing out of the relationship of employer and employee, which rights of action did not formerly exist, such rights of action by the representative of an employee who has lost his life, may be prosecuted for the benefit of the class limited and designated in the section itself. So construed there is no conflict between the two sections. This construction, we repeat, is not only reasonable, but uniformly it is the construction which other courts have put upon their laws in cases where the provisions of those laws are similar or identical with our own. We need not be

at pains to review these authorities at length. It will be sufficient to refer to"—citing a number of cases.

April 8th, 1911, California passed another Act (Stats. 1911, p. 756), providing, among other things, as follows:

"In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant."

The right of action for the death of the deceased being given by a statute of the state, a court of admiralty will enforce it (authorities *supra*), but enforce it in accordance with the recognized principles of maritime law unaffected by the provisions of any state or local law. Otherwise one admiralty court might readily be required to rule one way upon a certain state of facts, and another to rule another way upon a precisely similar state of facts, depending upon conflicting state or local laws, thus working the practical destruction of a uniform maritime law. For this reason the California statute of limitations of one year, relied upon by the appellant in bar of the action, has no more application to the case than had the California statute of frauds involved in the case of Union Fish Company vs. Erickson, *supra*, just decided by the Supreme Court.

The Court below found that the death of Sousa was caused by the negligence of the hatch-tender in withdrawing the bucket from the hopper before it was fully dumped, and to his negligence in not giving warning to those in the hold where Sousa was working as a stevedore and killed, and, further, that the deceased was not guilty of any contributory negligence.

Upon the record we see no sufficient reason to disturb those findings of fact.

We also agree with that court that the risk of his employment did not include the spilling of such a

quantity of coal through the hatch as inflicted the fatal injury, even though it be conceded that the deceased assumed the ordinary risk of his employment due to the falling of an occasional lump of coal.

We are of the opinion that upon the merits the case was rightly decided, and that we would not be justified in increasing the amount of the award, as the appellee contends we should, made by the trial court, which was $10,000.00, less $494.00 already paid.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Feb. 3, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, First Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with interest from the date of the rendition of said decree and with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Decree, as Amended Pursuant to Order Entered February 26, 1919. Vacated and Set Aside Pursuant to Order Entered October 9, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Filed and entered February 3, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday the twenty-sixth day of February, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Amending Decree.

Upon motion of Mr. Henry Heidelberg, counsel for the appellee, and good cause therefor appearing, ORDERED decree of this Court filed and entered February 3, 1919, be amended by adding thereto the provision that interest be allowed from the date of the rendition of the decree of the said District Court.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twentieth day of May, in the year of our Lord one thousand nine hundred and nineteen. Present, The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Granting Petition for Rehearing, etc.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the case was heard, it is ORDERED that the petition, filed March 5, 1919, on behalf of the appellant for a rehearing in the above-entitled cause be, and hereby is granted.

It is FURTHER ORDERED that the above-entitled cause be assigned for hearing on May 26, 1919.

At a stated term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-sixth day of May, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order of Submission on Rehearing.

ORDERED appeal in the above-entitled cause, on rehearing, argued by Mr. Hartley F. Peart, counsel for the appellant, and by Messrs. Chris. M. Bradley and Henry Heidelberg, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to respective counsel to file typewritten supplemental briefs within five (5) days from date.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixth day of October, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Directing Filing of Opinion on Rehearing.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cause on rehearing was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause on said rehearing, be forthwith filed by the clerk.

It is FURTHER ORDERED that the Decree of this Court, filed and entered on February 3, 1919, be vacated and set aside, and that a Decree be filed and entered in accordance with the opinion this day filed.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Opinion on Rehearing.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge:

The case was stated when last under consideration here (255 Fed. 817), which statement need not be repeated.

The numerous preceding and conflicting decisions of both Federal and State courts with respect to the provisions of state statutes at variance with the general maritime law in suits for personal injuries were finally disposed of by the decision of the Supreme Court in the case of Southern Pacific Co. vs. Jensen, 244 U. S. 205, so that we think it unnecessary to make further reference to those cases. The Jensen case grew out of the alleged wrongful death of a person, a right of action for which was given by a state statute. The later case in the same court of Chelentis vs. Luckenbach S. S. Co., 247 U. S. 372, grew out of personal injuries not resulting in death, but in

neither of those decisions of the Supreme Court was the slightest distinction made between cases for wrongful death and those for personal injury not resulting in death. It is clear, we think, that no such distinction exists, and that a right of action not given by admiralty but by a state statute, while enforceable in a court of admiralty under the law as established by the Supreme Court in the cases above cited and by other of its decisions there referred to, will be enforced only in accordance with the recognized principles of the maritime law. Regarding that question we are entirely satisfied of the correctness of our former decision in the present case. The error into which we then fell grew out of our not treating the deceased Souza and the winch-driver and hatch-tender, through whose negligence the accident occurred, as fellow-servants. That they were such fellow-servants, for which reason the appellant cannot be held responsible, was decided in a similar case by this court in The Hoquiam, 253 Fed. 627. See, also, the similar decision of this court in the case of Olson vs. Oregon Coal & Navigation Co., 104 Fed. 574, and the cases there cited.

We see no escape from the conclusion that the judgment appealed from must be reversed with directions to the court below to dismiss the action at the cost of the libelant, and it is so ordered.

[Endorsed]: Opinion. Filed Oct. 6, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, First Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellant and against the appellee and that this cause be and hereby is remanded to the said District Court, with directions to said District Court to dismiss the action at the cost of the libelant.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Decree, Vacated Pursuant to Order Entered October 30, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Filed and entered October 6, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the thirtieth day of October, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Order Granting Petition for Rehearing, Vacating Decree, and Certifying Certain Questions to the Supreme Court of the United States.

By direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, ORDERED

petition, filed October 17, 1919, on behalf of the appellee for a rehearing after decision on rehearing of the above-entitled cause be, and hereby is granted and that the decree of this court filed and entered on October 6, 1919, be, and is hereby vacated and set aside, and that the certificate of this court certifying certain questions of propositions of law to the Supreme Court of the United States be filed, and that a certified copy thereof be forwarded to the clerk of said Supreme Court for filing, etc.

Ross, Circuit Judge, before whom, together with the Honorable Wm. B. Gilbert and William H. Hunt, Circuit Judges, the cause was heard, dissents from the order granting the petition for rehearing and vacating and setting aside the said decree.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY (a Corporation),
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Upon Appeal from the United States District Court, Northern District of California, Southern Division.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239, Judicial Code.

Before GILBERT, ROSS and HUNT, Circuit Judges.

This cause came to the Circuit Court of Appeals for the Ninth Circuit upon an appeal from the United States District Court for the Northern District of California, Southern Division, from a judgment in favor of the appellee, as libelant in that court, against the appellant, as libelee in that court, for the sum of $10,000. The cause was a libel in admiralty for damages for wrongful death.

Manuel Souza, a citizen and resident of California, was killed while in the employment of Western Fuel Company, a corporation of California, working in the hold of the steamship "Tancred," which was unloading at the bunkers of Western Fuel Company, in Oakland, California. This occurred on August, 5, 1916. The deceased employee left him surviving a widow and five minor children.

On August 24, 1916, the widow of Manuel Souza made an application for adjustment of a claim presented by her against the Western Fuel Company to the Industrial Accident Commission of the State of California under the Workmen's Compensation, Insurance and Safety Act of California, (Chapter 176, Laws of 1913, Stats. 1913, page 279). The State

Industrial Accident Commission made an award favorable to the widow. The matter was taken to the Supreme Court of California for review, and on August 6, 1917, the award made by the State Industrial Accident Commission was annulled as having been made without jurisdiction, in view of the decision of the Supreme Court of the United States in the case of Southern Pacific Company vs. Marie Jensen, 244 U. S. 205.

Thereafter, to wit, on August 21, 1917, this cause was initiated by the filing of a libel for damages for wrongful death in the District Court of the United States for the Northern District of California, Southern Division.

In this cause the appellee relies upon the provisions of the statutes of the State of California giving a right of action for wrongful death and modifying in very substantial particulars the common law defenses of assumption of risk, negligence of a fellow-servant and contributory negligence in cases where the relationship of employer and employee is involved. (Section 377, Code of Civil Procedure and Section 1970 of the Civil Code of California.)

The District Court, rendering its decree, applied the law as expressed in the California Code provisions above cited, having reference also to a state statute known as the "Roseberry Act" of 1911 (Chapter 399 of the Laws of 1911; Stats. 1911, page 796), Section 1 of which abolishes the doctrine of assumption of risk and the defense of negligence of a fellow-servant, and found, to which this Court agrees, that the death of Souza was caused by the negligence

of a fellow-servant and held that the Roseberry Act of 1911 warrants recovery by the appellee herein because it does away with the doctrine of assumption of risk and the defense that the accident was caused by the negligence of a fellow-servant.

Questions of law concerning which the Circuit Court of Appeals of the Ninth Circuit desires the instructions of the Supreme Court are:

1. Are the statutes of the State of California, conferring the right of action for wrongful death, to be applied in libels in admiralty for wrongful death?

2. If the state statutes do apply, are they to be applied with all their incidents abolishing or modifying the common-law defenses of assumption of risk, contributory negligence and the negligence of a fellow-servant, or

3. Does the state statute merely give the right of action and leave for application the rules of maritime law covering personal injuries, thus doing away with any distinction heretofore recognized between actions for personal injuries not resulting in death and actions for wrongful death sanctioned by state statutes?

WM. B. GILBERT,
ERSKINE M. ROSS,
WM. H. HUNT,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, Cal., October 30th, 1919.

[Endorsed]: Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239, Judicial Code. Filed October 30, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation,
Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased,
Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 2 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and thirteen (213) pages, numbered from and including 1 to and including 213, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, including Libellant's Exhibits "A" and "C" and Libellee's Exhibits 1 and 2, and certified under section 2 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, this 15th day of December, A. D. 1919.

[Seal]

F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Western Fuel Company is appellant, and Antone Garcia, as Administrator of the Estate of Manuel Souza, deceased, is appellee, No. 3195, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of March, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

[Endorsed:] File No. 27,444. Supreme Court of the United States, October Term, 1920. No. 229. Western Fuel Company vs. Antone Garcia, as Administrator, etc. Writ of Certiorari. Docketed. No. 3195. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 13, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Received Apr. 2, 9.04 a. m., '21, New York.

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United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation, Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased, Appellee.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated and agreed by and between Western Fuel Company, a corporation, appellant, and Antone Garcia, as administrator of the estate of Manuel Souza, deceased, appellee, that the certified transcript of the record now on file in the Supreme Court of the United States and the original exhibits sent up with said certified transcript of record in that certain cause therein pending, entitled "Western Fuel Company, a corporation, appellant, vs. Antone Garcia, as Administrator of the Estate of Manuel Souza, deceased, appellee," and numbered 689, shall stand and be considered as the return to the writ of certiorari heretofore granted by the Supreme Court of the United States in the above entitled cause in said court, and dated the 31st day

of March, 1921, and filed herein on the 13th day of April, 1921.

Dated: April 20, 1921.

(Sgd.) HARTLEY F. PEART,
(Sgd.) IRA S. LILLICK,
Counsel for Appellant.
(Sgd.) HENRY HEIDELBERG,
(Sgd.) CHRISTOPHER M. BRADLEY,
Counsel for Appellee.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed April 23, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation, Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Cir-

cuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 23d day of April, A. D. 1921, as the original thereof remains on file and of record in my office.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of April, A. D. 1921.

[United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3195.

WESTERN FUEL COMPANY, a Corporation, Appellant,

vs.

ANTONE GARCIA, as Administrator of the Estate of MANUEL SOUZA, Deceased, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," in which said stipulation it is pro-

vided that the certified Transcript of Record and exhibits heretofore filed by the appellant in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 23d day of April, A. D. 1921.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of April, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed:] File No. 27,444. Supreme Court U. S., October Term, 1920. Term No. 229. Western Fuel Co., Petitioner, vs. Antone Garcia, as Adm'r, etc. Writ of certiorari and return. Filed April 28, 1921.